

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

Quest over

BRIEF FOR APPELLANT AND JOINT APPENDIX

**IN THE
United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,081

DISTRICT OF COLUMBIA, *Appellant,*

v.

AILEEN B. RANDLE, *Appellee*

88

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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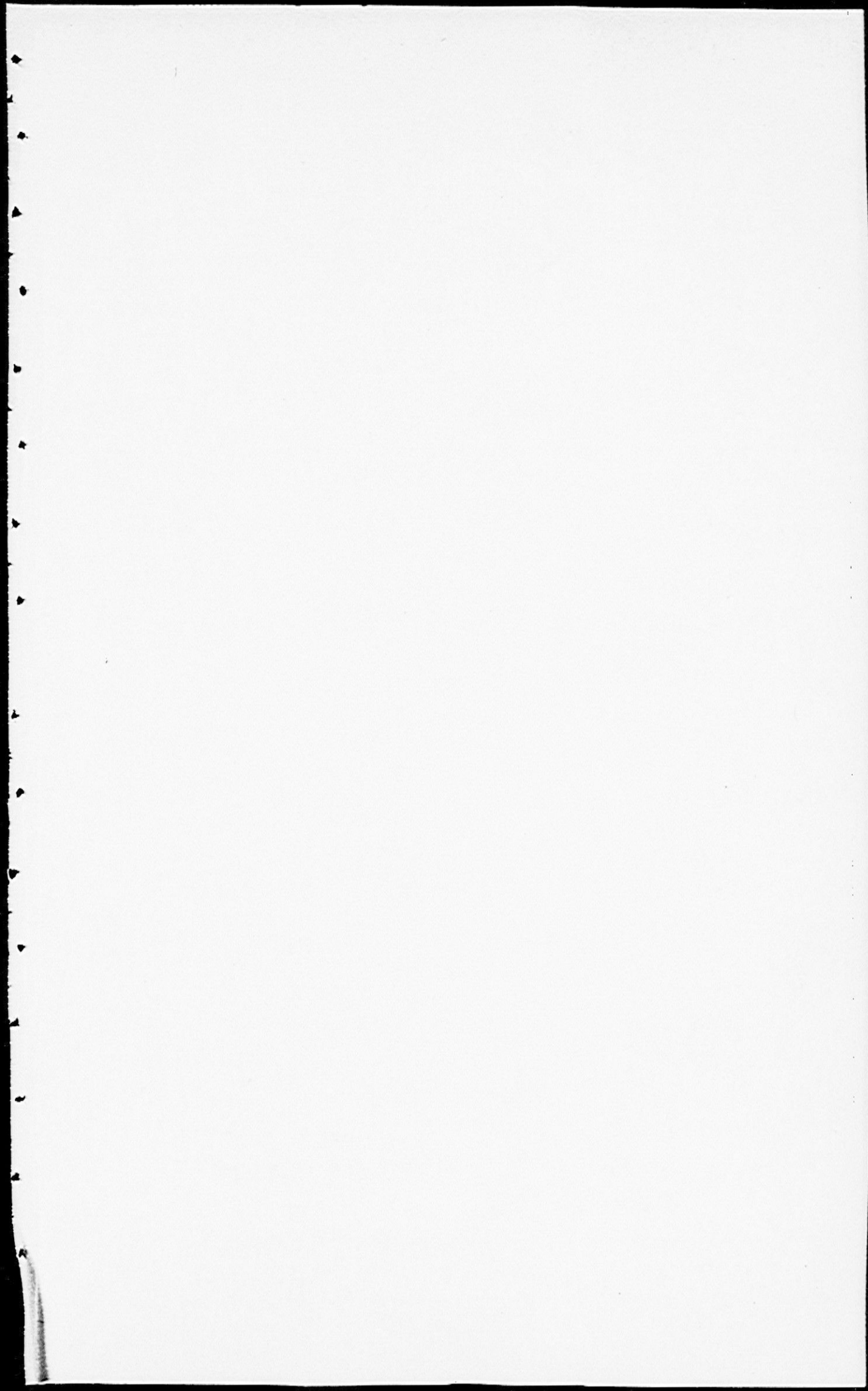
*United States Court of Appeals
For the
District of Columbia Circuit*

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Joseph W. Stewart

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,081

DISTRICT OF COLUMBIA, *Appellant*,

v.

AILEEN B. RANDLE, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The verdict of the jury and the judgment of the court entered thereon were filed November 25, 1953 (App. 4). On December 14, 1953, the District Court denied the defendant's motion for judgment *non obstante veredicto*, or, in the alternative, for a new trial (App. 5). On January 13, 1954, the defendant filed a notice of appeal from the judgment of the District Court. This Court has jurisdiction under Title 28, U. S. Code Revised, Sec. 1291.

STATEMENT OF THE CASE

This is a suit for damages for personal injuries sustained by appellee (plaintiff below) allegedly as a result of the negligence of appellant, the District of Columbia (defendant below) in failing to exercise reasonable care to maintain a sidewalk in a reasonably safe condition.

Appellee, in her complaint (App. 1, 2) and the amendment thereto (App. 3) alleged that on August 24, 1950 she fell sustaining a broken left ankle, great pain of body and mind, permanent deformity in the aforesaid ankle, incurred medical expenses and loss of salary and demanded judgment against appellant. She further alleged the fall and personal injuries were caused by her stepping upon a projecting U-shaped metal base imbedded in the sidewalk tree space located on the southeast corner of 8th Street and Independence Avenue, S. W. in the District of Columbia; that the tree space was under control of appellant, and that the fall was due to the negligence and carelessness of the appellant through its agents, servants and employees, " * * * in failing to maintain said tree space in a reasonably safe condition, in failing to remove therefrom the said metal base which it had placed therein and failed to remove after actual or constructive notice thereof, * * *". (App. 3.)

Appellant answered alleging the complaint failed to state a claim upon which relief could be granted, denying negligence on its part and denying any notice, actual or constructive, of the alleged defect, and asserting that appellee's injuries and damages, if any, were proximately caused by her own negligence or contributory negligence. (App. 2, 3.)

The case came on for trial before the lower court on November 23, 1953, and a jury having been duly impaneled and sworn, the court, over objection of the appellant, excluded from the courtroom during the trial, on the sole

ground he would give testimony in the case, the Assistant Inspector of Claims of the District of Columbia, who was there as the representative of the appellant. (App. 7, 8, 9.)

Appellee testified that about 1:00 P.M., August 24, 1950 (App. 9, 10) she was walking east on the south side of Independence Avenue, S. W., (App. 12, 13) with Miss Jessie Brook, now Mrs. Suderman (App. 18), who was on her right (App. 11.) The weather was pleasant. (App. 18.) She said that she crossed 8th Street (App. 13) and that when she came to the concrete curb she placed her right foot on the curb and stepped into the tree box with her left foot. (App. 11.) She stated further her left foot came down "half way" on a metal standard in the shape of a horseshoe which projected two or three inches above the surface of the tree box and which was obscured from her view by grass, causing her ankle to buckle and she fell (App. 11, 13, 14) sustaining the injuries alleged in her complaint. (App. 17, 18.) She further testified that at this corner " * * * going directly down the pavement, there is a tree right in the center of the pavement where pedestrians have to walk. The pavement I think is about six feet in width and the tree box is the same six feet in width, which allows no concrete to continue directly on the sidewalk", and " * * * the only concrete that is left is a concrete circular curb of about a couple of feet and there were a couple of gentlemen standing there, which necessitated my walking to the right." (App. 11.)

Carlo A. Maggi, called as witness for appellee, testified he was a photographer and, at appellee's request, took certain pictures which were introduced in evidence. (Plaintiff's Exhibits Nos. 4-A, 4-B, 4-C and 4-D) (App. 22-26.)

Antonio Mario Casanova Cortizas, called as a witness for appellee, testified that on August 24, 1950 he noticed two young ladies walking in front of him and two men on the corner of 8th and Independence Avenue, S. W.; that he saw

appellee fall and presumed she fell in the tree box over " * * * an iron object exposed in the ground * * * about two and a half or three inches from the ground. * * *" (App. 26-33.)

Jessie Brook Suderman, called as a witness for the appellee, testified that she, in company with appellee was walking on Independence Avenue, S. W. on August 24, 1950 and that at 8th and Independence Avenue, S. W. there is a tree in the middle of the sidewalk. She said that she spoke to two gentlemen. She further stated that appellee was to her left and stepped on a sawed-off standard sticking up in the unpaved space around the tree and fell. (App. 34-38.)

Joseph Parlon, called as witness for the appellee, testified that he had been employed by the Department of Highways of the District of Columbia for 29 years and was trade foreman in charge of signs. He stated that the piece of metal shown in Plaintiff's Exhibit No. 4-D looked like the type of pole used by the District of Columbia for stop signs and no parking signs and that apparently it had been sawed off. He further stated that it was his practice in moving poles, to remove them if possible, but if not, to saw them off and drive them into the ground. He further testified that he had searched his records and found that only one sign had ever been installed on the southeast corner of 8th and Independence Avenue, which sign was installed in 1942. He identified that sign as the stop sign still standing and shown in Plaintiff's Exhibit No. 2-A. He stated his records showed further that no sign had ever been taken down at the corner of 8th and Independence Avenue, S. W. (App. 38-42.)

Benjamin Paul Blaine, called as a witness for the appellee, testified he was employed by the National Capital Parks, Department of Interior, and installed signs for the park police in the park area. He stated further the District puts up signs through the streets and " * * * this one

particular location would come under the District government". (App. 41-43.)

Oscar J. Avallone, an Assistant Inspector of Claims, Government of the District of Columbia (App. 46), called as a witness for appellant, testified that on November 22, 1950, after receiving certain information from appellee's attorney, he examined the tree space at 8th and Independence Avenue, Southwest (App. 50) and located a stanchion or standard in the tree space; that he took measurements and found "It protruded above the surface of the ground three quarters of an inch." (App. 51.)

STATUTES INVOLVED

There are no statutes or regulations involved herein.

STATEMENT OF POINTS

1. The trial court erred in excluding from the courtroom during the trial, on the sole ground that he would give testimony in the case and was, therefore, subject to the rule on witnesses, the Assistant Inspector of Claims of the District of Columbia, who was there as the representative of the defendant.

2. The trial court erred in denying defendant's motion for a directed verdict at the conclusion of all the testimony, the plaintiff having failed to prove the following allegation of paragraph 3 of the complaint:

"* * * said fall was due to the negligence and carelessness of said defendant through its agents, servants and employees, in failing to maintain said tree space in a reasonably safe condition, in failing to remove therefrom the said metal base which it had placed therein * * *"

which allegation formed the sole basis of plaintiff's claim of negligence.

3. The trial court erred in denying defendant's motion for a directed verdict at the conclusion of the plaintiff's case, there being no proof of any notice, actual or constructive, to the District of Columbia of the alleged defect in the tree space.

4. The trial court erred in denying defendant's motion for a directed verdict at the conclusion of all the testimony, the plaintiff having failed to prove notice, actual or constructive, to the District of Columbia of the alleged defect in the tree space.

5. The trial court erred in denying defendant's motion for judgment *non obstante veredicto*, or, in the alternative, for a new trial on the grounds hereinabove set forth.

SUMMARY OF ARGUMENT

It was prejudicial error for the lower court to exclude from the courtroom during the trial an Assistant Inspector of Claims for the District of Columbia who was there as the representative of the municipal corporation. The sole ground for such exclusion of a representative of the corporation was that he would give testimony in the case and, was therefore, subject to the rule on witnesses. It is elementary law that every party to an action is entitled to be present in the courtroom during the course of a trial. This right extends to corporations, municipal as well as private, and this Court has so held.

The District of Columbia is not liable for injuries resulting from a dangerous condition in the street unless it had notice, actual or constructive, of the existence of such dangerous condition. In the case at bar, there was no evidence that the District had any notice, actual or constructive, and therefore the lower court erred in not directing the verdict for the defendant.

In her complaint the appellee's sole allegation of negligence was that her fall " * * * was due to the negligence and carelessness of said defendant through its agents, servants and employees, in failing to maintain said tree space in a reasonably safe condition, in failing to remove therefrom the said metal base which it had placed therein and failed to remove after actual or constructive notice thereof, * * *." There is no evidence in the record that the District ever installed the metal base involved, that it had notice of the existence of such metal base or that it failed to remove the same after any such notice. It was, therefore, error for the trial court not to direct a verdict for the District of Columbia. Many cases decided by this Court make this principle of law abundantly clear.

ARGUMENT

I

The Court Erred in Excluding Appellant's Representative from the Courtroom During the Trial

At the outset of the trial, over objection of appellant, the court below excluded Oscar J. Avallone, Assistant Inspector of Claims, Government of the District of Columbia, and appellant's official representative, from the courtroom during the trial on the sole ground he was going to be a witness at the trial although it was stated at the bench, and not controverted, that "He is the claims inspector for the District of Columbia, the District of Columbia's representative in this matter before the court." (App. 8.)

It is fundamental that a party to an action is entitled to be present in the courtroom during the trial of his cause. *Coonan v. Baltimore and O. R., Co.*, (DC) 25 F. Supp. 834, 835; *Georgia R. R. and Banking Co. v. Tice, et al*, 124 Ga. 459, 52 S. E. 916, 4 Ann. Cas. 200; *Schneider v. Haas*, 14 Or. 174, 12 P. 236, 237, 58 Am. Rep. 296; *Smith v. Collins*, 94

Ala. 394, 10 So. 334; *Pedro v. Tederoff*, 77 Cal. App. 164, 247 P. 212; *Seaboard Airline Ry v. Scarborough*, 52 Fla. 425, 42 So. 706. As was stated in *Larue v. Russell*, 26 Ind. 386, " * * * The right of a party litigant to be present during the trial of his cause, that he may be heard in his own behalf, has been so long accorded by universal custom, and it is so obviously necessary to the security of private rights, that the refusal to entertain the cause at all would scarcely be a greater error than the denial of the privilege. * * *."

This court has previously passed on the question here raised in the case of *District of Columbia v. Flagg*, 42 App. D. C. 73, 76, where the facts were analogous to those with which we are here confronted. There, the trial court refused to permit the witness Bradshaw to give testimony upon the ground that he had remained in the courtroom in violation of an order of court excluding witnesses from the courtroom during the trial. The record of this Court will show that there, as here, the witness was from the Office of the Inspector of Claims for the District of Columbia, and present as the representative of the District. This Court there said:

"Not so important, since the evidence was perhaps cumulative, but equally erroneous, was the refusal of the court to permit the witness Bradshaw to testify, upon the ground that he had remained in the court room in violation of an order of court excluding the witnesses from the court room during the trial. It was stated at bar, and not controverted, that he was at the counsel table during the trial as the representative of the District. *It is always improper to exclude a litigant,*

and we think the same rule should apply to the representative of a corporation. Heaton v. Dennis, 103 Tenn. 155, 52 S. W. 175; *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879; *Cottrell v. Cottrell*, 81 Ind. 87 * * *'" (Emphasis Supplied.)

In *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879, where an officer of a corporation was made subject to the rule on witnesses although it was requested that he be excepted from the operation of the rule, the court stated, "It is true that it was a corporation which was a party to the present litigation; * * * They can only be present by their representative; and if it be that they are not, and adversary parties are, entitled to exemption from the rule, it is apparent the statute will operate with inequality, and often with great unfairness. We see no reason for adopting a construction which would work such partial results. We hold, therefore, that the officer of a corporation, charged with the duty of looking after its interests in a pending trial, falls within the spirit of the act in question. * * *". And in *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543, 555 Ann. Cas. 1913D-1262 the court said " * * * although the rule be granted, a party to the cause who intends to be a witness need not go under it * * * or an officer of a corporation whose presence is necessary for assistance to the attorney of the latter in presenting the case. * * *"

It was, therefore, prejudicial error for the court to exclude appellant's representative.

II

The District of Columbia is not Liable for Injuries Resulting from Defects in the Streets unless it Had Timely Notice of the Dangerous Condition of the Street

The District of Columbia is not an insurer of the safety of persons coming upon its streets. Its duty is to exercise reasonable care to maintain the several parts of its streets in a reasonably safe condition for the purposes for which they are intended and before there can be a recovery for injuries sustained thereon, plaintiff must show that his injuries were caused by a dangerous or defective condition

of the portion of the street being used by plaintiff for its intended purpose and that the District of Columbia had notice, actual or constructive, of such condition. *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472; *Way, et al. v. Efdimis*, 66 App. D. C. 92, 85 F. 2d 258; *District of Columbia v. White*, 48 App. D. C. 44; *Jackson v. District of Columbia*, 48 App. D. C. 396; *District of Columbia v. Blackman*, 32 App. D. C. 32; *Borough of Du Bois v. Pancoast*, 218 F. 60 (C. C. A. 3rd).

In *District of Columbia v. Woodbury*, *supra*, the Supreme Court of the United States, in defining the duty of the District of Columbia with respect to the maintenance of its streets and sidewalks, said at p. 477:

“The district government, as a municipal corporation, is charged with the duty of supervising the streets of Washington, and keeping them in a condition fit for convenient use and safe against accident to travelers using them. But it is not under an absolute obligation to respond for every accident a man may suffer in its streets. It is simply bound to practice due care and diligence in the exercise of its powers and in the application of its resources towards the objects named. If due care is once exercised, and, notwithstanding, an accident occurs and somebody is injured it is the misfortune of the victim and not the fault of the authorities. If its duty has been fully performed in regard to any particular street and that street has been put in good condition, safe against all accidents that could be foreseen and provided for, and afterwards, by some casualty, it falls into dilapidation and becomes dangerous, as, for instance, by the caving in of a sewer, and then an accident happens, *the rule is that the district government is not responsible for the injury that results, unless it had timely notice of the dangerous condition of the street, so that it could be put in repair and the danger odviated. * * **” (Emphasis supplied.)

* * * * *

“* * * The District would not be responsible for damages arising from the bad condition of a street unless actual notice was brought to them of the condition of the street, or unless the street remained in an unsafe condition so long that they ought to have known of it if they exercised ordinary care.”

The record in this case is devoid of any evidence showing notice either actual or constructive to the District of Columbia of the alleged defect. (App. *passim*) On the contrary, appellee's witness Cortizas testified that, in all the times when he had previously seen the tree box, he never observed the stanchion (App. 32), and her witness Parlon testified that his records failed to disclose that the District of Columbia had ever placed a sign at the location of the alleged fall. (App. 40.)

III

Appellee Failed to Prove Her Sole Allegation of Negligence

Appellee's sole allegation of negligence is contained in paragraph number 3 of her complaint, as amended, wherein she states:

“* * * said fall was due to the negligence and carelessness of said defendant through its agents, servants and employees, in failing to maintain said tree space in a reasonably safe condition, in failing to remove therefrom the said metal base which it had placed therein and failed to remove after actual or constructive notice thereof, * * *”

There is not one scintilla of evidence that the District of Columbia installed the metal base over which appellee allegedly fell (App. *passim*). As stated herein *ante*, appellee's own witness Parlon, testified his records failed to disclose that the District of Columbia had ever placed a sign

at the specific location of the alleged fall. On the contrary, Parlon's testimony affirmatively established, from a comparison of appellee's own Exhibit No. 2-A with official records, that the only sign erected by appellant at 8th Street and Independence Avenue, Southwest, was a stop sign; that the stop sign has never been removed from any location at that corner and that said sign still stands at the corner near where appellee allegedly fell. (App. 40-41.) Appellee's allegation, *supra*, (which is her only allegation of negligence) is in the conjunctive, not the disjunctive, and there being no evidence that the metal base referred to was installed by the District of Columbia, appellant's motion for a directed verdict should have been granted. *Speirs v. District of Columbia*, 66 App. D. C. 194, 85 F. (2d) 693; *Fleming v. Fisk*, 66 App. D. C. 350, 87 F. 2d 747; *Brown v. Capital Transit Co.*, 75 U. S. App. D. C. 337, 127 F. 2d 329, Certiorari denied 63 S. Ct. 61, 317 U. S. 632, 87 L. Ed. 510.

Moreover, appellee's feeble attempt to prove her case must fall for another reason. She attempts to draw an inference from an inference, which the law does not permit. *Parlton v. U. S.*, 64 App. D. C. 169, 75 F. 2d 772, 776; *Weaver v. B. & O. R. R.*, 3 App. D. C. 436, 454; *Manning v. John Hancock Mutual Life Ins.*, 100 U. S. 693; *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 50 L. Ed. 564. Since there was no testimony of a direct report thereof, admittedly, the District of Columbia had no actual notice of the existence of the cut-off stanchion in the tree space at 8th Street and Independence Avenue, Southwest, unless the District itself installed the stanchion, cut it off, and allowed it either to remain partly exposed or permitted it to later become exposed. What was the proof of these necessary and vital elements of appellee's case? The record discloses only (1) testimony of the existence of the protruding cut-off stanchion at the time of appellee's alleged fall, and (2) testimony that the protruding piece "looks like the same

type of pole that we (the District) use." (App. 39.) From these bits of testimony appellee must, to prevail, in the absence of proof of notice, draw the following inferences, one upon the other:

- (1) The appellant installed a stanchion at the spot where appellee fell;
- (2) The appellant later cut off the same stanchion near the ground;
- (3) Either
 - (a) After the stanchion was cut off it was allowed to remain protruding above the ground in the tree space, or
 - (b) After cutting off the stanchion and driving the small remaining portion into the ground, erosion occurred so that the portion so driven into the ground protruded at some later date not disclosed.

Not only does the law forbid the pyramiding of inferences upon inferences, but it is a well established rule that a jury should not be allowed to speculate as to an essential element such as negligence or notice. *N. Y. Cent. T. Co. v. Ambrose*, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198. The recovery accorded below to the appellee could have been predicated only on speculation.

CONCLUSION

The lower court committed prejudicial error in excluding the District's representative from the court room during the trial.

The lower court erred in not directing a verdict for the District of Columbia since there was no evidence of any notice, actual or constructive, to the District of any dangerous condition existing in the street. There was no evidence that the District was guilty of any negligence in this case.

The judgment of the lower court was in error and should be reversed.

Respectfully submitted:

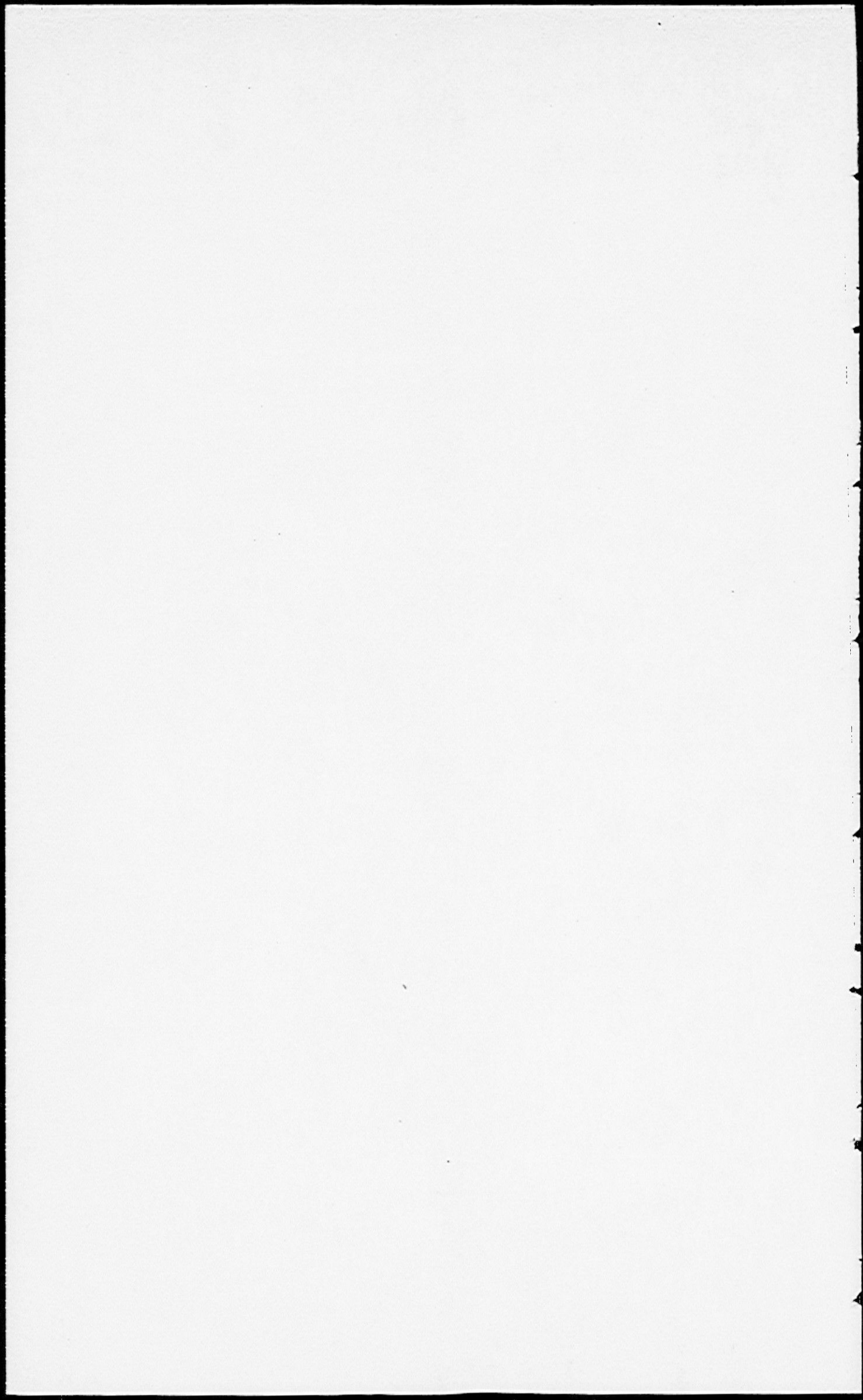
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JOINT APPENDIX

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194 UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil Action No. 2641-51

AILEEN B. RANDLE, *Plaintiff*
1377 Independence Avenue, S. E.
Washington, D. C.

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, *Defendant*.
District Building 14th & E Streets, N. W.
Washington, D. C.

COMPLAINT FOR DAMAGES FOR PERSONAL
INJURIES

1. Plaintiff's claim is in excess of \$3,000.00 and jurisdiction of this Court is invoked under Title II, Sec. 306, 1940 District of Columbia Code.

2. Defendant is a municipal corporation, being charged by law with the maintenance of certain sidewalks located in the District of Columbia, as will hereinafter more fully appear.

3. Plaintiff alleges that prior to the 24th day of August, 1950, defendant negligently maintained sidewalks at or about the southeast corner of 8th Street and Indiana Avenue, Southwest, in that, through its agents, it negligently and carelessly removed a sign therefrom by severing its standard and negligently leaving projecting above the afore-

said sidewalk several inches of the "U" shaped standard; that this projecting object constituted a dangerous hazard to pedestrians utilizing said sidewalk, all of which defendant had actual and constructive notice.

4. Timely notice, as required by Title 12, Section 208 of the District of Columbia Code, 1940, was rendered to defendant.

5. Plaintiff further alleges that on or about the 24th day of August, 1950, she was a lawful pedestrian utilizing, in a careful and proper manner, the aforesaid sidewalk when she tripped and fell on the offending object and was hurled to the sidewalk in a forceful and violent manner.

6. Plaintiff further alleges that as a result of defendant's negligence aforesaid she sustained a broken left ankle; suffered great pain of body and mind; sustained permanent deformity in the aforesaid ankle; incurred medical expenses, loss of salary, all to her damage in the sum of \$10,000.00.

WHEREFORE, Plaintiff demands judgment against the defendant in the sum of \$10,000.00 besides the cost of this action.

* * * * *

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ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Answer

1. The allegations of paragraph 1 are admitted.

2. Defendant says that it is a municipal corporation and as such is required to exercise reasonable care to maintain the streets and sidewalks of the District of Columbia in a

reasonably safe condition. The remaining allegations are denied.

3. The allegations of paragraph 3 are denied.

4. The allegations of paragraph 4 are admitted.

5 and 6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5 and 6.

Third Defense

Defendant says that plaintiff's injuries and damages, if any, were proximately caused by her own negligence.

Fourth Defense

Defendant says that plaintiff was guilty of contributory negligence.

* * * * *

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AMENDMENT TO COMPLAINT

Paragraph 3 of the Complaint is hereby amended as follows:

"On or about August 24, 1950, plaintiff, a pedestrian was caused to fall and sustain personal injuries by stepping upon a projecting metal U-shaped base imbedded in the side walk tree space located on the southeast corner of 8th and Independence Avenue, Southwest, in the District of Columbia, which tree space was under the control of the defendant, and said fall was due to the negligence and carelessness of said defendant through its agents, servants and employees, in failing to maintain said tree space in a reasonably safe condition, in failing to remove therefrom the said metal base which it had placed therein and failed to remove after actual or constructive notice thereof, and which constituted a hazard, a menace, and a dangerous obstruction to pedestrians such as the plaintiff lawfully using said tree space in the course of travel upon the public sidewalks."

* * * * *

VERDICT AND JUDGMENT

This cause having come on for hearing on the 23rd day of November, 1953, before the Court and a jury of good and lawful persons of this district, to wit:

Edward J. Newmyer	Hansel H. Plevins
Ivan W. Olson	Lee J. Vincelette
Chester Manoff	Richard C. Stone
Maurice H. Mansfield	Julius B. Naiman
Fiorello P. Caponiti	John F. Welch
Ellen P. Hunter	Florence M. Bacon

who, after having been duly sworn to well and truly try the issues between Aileen B. Randle, plaintiff and District of Columbia, defendant, and after this cause is heard in part, juror No. 2, Ivan W. Olson, is excused by the Court and this cause, with consent of counsel proceeds with eleven jurors; and after this cause is heard and given to the jury in charge, they upon their oath say this 25th day of November, 1953, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of Five Thousand (\$5,000.00) Dollars.

WHEREFORE, it is adjudged that said plaintiff recover of the defendant the sum of Five Thousand (\$5,000.00) Dollars together with costs.

Harry H. Hull, Clerk

By direction of
Judge Jennings Bailey

By Irene B. Burroughs
Deputy Clerk

208 MOTION FOR JUDGMENT NON OBSTANTE
VEREDICTO, OR, IN THE ALTERNATIVE,
FOR A NEW TRIAL

Comes now the defendant and moves this Honorable Court for judgment non obstante veredicto, or, in the alter-

native, for a new trial, and for reasons therefor states as follows:

1. The court erred in excluding the representative of the District of Columbia from the courtroom.

2. The court erred in denying defendant's motion for a directed verdict at the close of plaintiff's case.

3. The court erred in denying defendant's motion for a directed verdict at the close of all the testimony.

4. The court erred in denying defendant's prayer number five.

5. The court erred in denying defendant's prayer number six.

6. The court erred in failing to charge the jury substantially as to the law as set out in defendant's prayers numbered five and six.

7. The verdict was contrary to the evidence.

* * * * *

JUDGMENT N. O. C., OR IN ALTERNATIVE, FOR A NEW TRIAL

Upon the coming on for hearing of the motion filed herein by defendant for judgment N. O. V., or in the alternative, for a new trial, it is this 14th day of December, 1953, ordered that said motion be, and the same is hereby overruled.

Harry M. Hull
Clerk,

By Anne W. Lyddane
Deputy Clerk.

By direction of
Judge Jennings Bailey

* * * * *

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Date	Proceedings	Fees	Total
1951	Deposit for cost by	10.00	10.00
June 27	Complaint, appearance and Jury Demand filed		
June 27	Summons, copies (1) and copies (1) of Complaint issued served 6-28-51		
July 17	Answer of deft. to complt.; app. of V. E. West, O. Gasch, & John F. Doyle; mailed 7-17-51. filed		
July 17	Calendared (N)		
1953			
Nov. 23	Appearance of Alvin L. Newmyer, Jr., & David M. Wortman, Newmyer and Bress, as attys. for pltf. filed		
Nov. 23	Appearance of Ralph I. Quenter, Jr., as atty. for deft. filed		
Nov. 23	Appearance of C. Marvin Ward as atty. for deft. filed		
Nov. 23	Jury Sworn; respited until Nov. 24, 1953 at 10:00 a. m.; Reporter—D. L. Harrison Bailey, J.		
Nov. 24	Trial resumed; juror No. 2 (Olson) excused by court, with consent of counsel case continues with 11 jurors; respited until Nov. 25, 1953 at 10:00 a. m.; Reporter—D. L. Harrison Bailey, J.		
Nov. 24	Amendment to complaint (Fiat) Bailey, J.		
Nov. 25	Trial resumed; same jury; Verdict for pltf. in sum of \$5,000.00; verdict and judgment for pltf. in sum of \$5,000.00; Reporter—D. L. Harrison Bailey J.		
Nov. 25	Defendant's instruction Nos. 1, 2, 3, 4, 5 and 6		
Nov. 25	Plaintiff's instruction No. 1 filed		
Dec. 2	Bill of costs verified by Alvin L. Newmyer, Jr. filed		
Dec. 3	Costs taxed for pltf. in amount of \$60.75 (N)		
Dec. 4	Motion of deft. for judgment N. O. V. or, in the		

alternative, for a new trial; C/M 12-4-53; P. & A.; M. C. 12-4-53 filed

Dec. 9 Transcript of Proceedings, Nov. 23, 1953; Reporter—D. L. Harrison; filed

Dec. 14 Memorandum of P. & A. of pltf. in opposition to motion for judgment N. O. V. or in alternative for new trial filed

Dec. 14 Certificate of service and explanation of date of filing of pltf. memorandum; C/M 12-14-53

Dec. 14 Order denying motion of deft. for judgment N. O. V. or in alternative for new trial (N) Bailey J. 1954

Jan. 13 Notice of appeal by deft; copy mailed to Alvin L. Newmyer, Jr., Esq., Newmyer & Bress, 1001 15th St., N. W. filed

Jan. 22 Designation of the Record. C/M 1-22-54; P&A C/M 1-22-54 filed

Jan 29 Designation of additional portions of record on appeal by pltf.; C/M 1-29-54. filed

Feb. 2 Points & Authorities of plaintiff in opposition to motion for judgt. N. O. V., or in the alternative for a new trial. filed

Feb. 2 Plaintiffs Exhibits, No. 1, 4A, 4B, 4C, 4D & 5D. filed

1 Monday, November 23, 1953.

The above-entitled cause came on for hearing before Honorable JENNINGS BAILEY, a Judge in the United States District Court, and a jury, at 10 a.m.

* * * * *

2 PROCEEDINGS

(A jury having been duly and impaneled and sworn to try the case:)

* * * * *

MR. QUINTER: Your Honor, may Mr. Avallone sit at the counsel table with me?

THE COURT: No.

MR. QUINTER: Your Honor will allow me an exception to the ruling?

May we approach the bench?

(Thereupon, counsel approached the bench and the following occurred:)

MR. QUINTER: Mr. Newmyer, His Honor just said Mr. Avallone could not sit at the bench. He is the claims inspector for the District of Columbia, the District of Columbia's representative in this matter before the Court. He is like a client in any other case.

THE COURT: I was trying a case last spring when the defendant was a cab company and a man was sitting next to counsel there and I asked if he was a member of the Bar and he said no, he was an agent for the insurance company. I wouldn't let him stay there.

MR. QUINTER: There is a case in our Court of Appeals which has to do with a former claims agent of the District of Columbia, which says he can sit there as
3 an agent of the District of Columbia. The District of Columbia was entitled to one agent.

THE COURT: If you let me have that case, I will act on it.

(Thereupon, counsel resumed their places in the courtroom and the following occurred:)

MR. NEWMYER: If he is going to testify I am going to object.

THE COURT: If he is I will exclude him. He is excluded.

MR. QUINTER: He was the former inspector of claims—

THE COURT: I exclude him, especially if he is going to be a witness.

* * * * *

6 THE COURT: Mr. Quinter, I think you were right on the view that the representative of the District could be present, but not as a witness.

MR. QUINTER: Well, it happened in this particular case that I gave you the man was a witness too.

THE COURT: I exclude him as a witness.

* * * * *

14 AILEEN BOSWELL RANDLE,

the plaintiff, was called as a witness and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEWMYER:

Q. What is your full name, Miss Randle? A. Aileen Boswell Randle.

15 Q. And where do you live? A. 1377 Indiana Avenue, Southeast.

Q. Can you speak a little louder? A. 1377 Indiana Avenue, Southeast.

Q. How long have you lived there? A. I suppose around 30 years.

Q. All right, now, Miss Randle, where are you employed at the present time? A. With the Department of Commerce.

Q. And what division of the Department of Commerce? A. Coast and Geodetic Survey.

Q. What is your position there? A. Secretary.

Q. Miss Randle, we are inquiring here about an accident which occurred on August 24, 1950. Where were you employed at that time? A. Still with the government, but with the Department of Agriculture.

Q. And where were you employed, in what division in the Department of Agriculture? A. R.E.A.

Q. And what was your job then? A. The same, a clerk-stenographer.

Q. And what was your civil service rating? A. GS-4.

16 Q. And what was your salary? A. I think it was around 3,600.

Q. Around? A. Yes. I may be wrong about that.

Q. Do you recall what your pay checks were at that time?

THE COURT: Well, now, can this be ascertained accurately? Don't waste time.

BY MR. NEWMYER:

Q. Miss Randle, on this particular date had you worked that day at your job? A. Yes, I was working that day.

Q. And what time of the day did this accident occur? A. Approximately 1:00 o'clock.

Q. And where were you going at the time of the accident? A. Well, I was on my way to lunch.

Q. Now, will you tell the Court and the jury how this accident occurred, which direction you were walking in, and what street you were on? A. Yes, I was on Independence Avenue, Southwest, and I was leaving the Department of Commerce walking to 7th and Independence Avenue where there is another Government cafeteria. And at 8th and Independence Avenue—that is one block before I got to the cafeteria—there is a tree and—

MR. QUINTER: (Interposing) It is a little difficult for me to understand. I didn't understand—you were
17 leaving the Department of Commerce? A. No, sir; the Department of Agriculture. There is a very very unusual arrangement right at that particular corner. I think on all other corners that I have ever—

BY MR. NEWMYER:

Q. Don't go into the other corners, but just tell them what occurred. Don't go into the other corners. A. Well, going directly down the pavement, there is a tree right in the center of the pavement where pedestrians have to walk. The pavement I think is about six feet in width and the tree box is the same six feet in width, which allows no

concrete to continue directly on the sidewalk. And to the left of the tree, that is—

THE COURT: You mean there is a curb there?

THE WITNESS: Yes, sir, there is a curb—there is a concrete curb.

THE COURT: And nothing between the curb and the tree park?

THE WITNESS: Let me see, now: The six feet of concrete where pedestrians usually walk, there is a six-foot tree bed there and the only concrete that is left is a concrete circular curb of about a couple of feet and there were a couple of gentlemen standing there, which necessitated my walking to the right.

THE COURT: Address yourself to the jury.

18 Q. You say there were a couple of gentlemen standing on the sidewalk space? A. That is right, there were a couple of gentlemen standing on the curb.

Q. And were you with anyone at the time? A. I was with another young lady and she was to my right. Now, there was only about a couple of feet of concrete to the left of the tree, which necessitated my walking to the right and she was to the right of me so naturally she set the distance from the tree that I would be walking. I came to the curb and, as I recall, my right foot ended up at the curb and I took one step with my left foot, which put me up in the tree box and onto this metal standard.

I couldn't see the metal standard too well because there was grass in front of it from my side, and I suppose the fact that my foot was just half way on the metal standard and half way on nothing at all that my ankle buckled over all the way from the top of the metal to the ground.

Q. Did you fall? A. And I fell.

Q. Now, I show you here a book of small photographs of this tree space area, which were taken the other day. You were present at the time? A. That is correct..

Q. Does this reflect the condition of the general
19 area and the tree space and its relation to the side-
walk as it was on the day of your accident? A. That
is exactly the same.

MR. NEWMYER: I would like to introduce this in evi-
dence.

MR. QUINTER: I have no objection to the introduction
of this particular photograph that was shown the plaintiff
in this case for the basis that it depicts the condition as it
existed on the date the pictures were taken and not the date
of the accident, August 24, 1950.

MR. NEWMYER: I agree to that. I am not asking the
jury to look at this with respect to the metal stob at all,
but just the general relation of the tree space to the side-
walk.

THE COURT: Very well. I take it your position is that
the general situation is not changed?

THE CLERK: Plaintiff's Exhibit No. 1.

MR. NEWMYER: I would like the jury, if I might, to
look at these at this time.

THE COURT: You have identified only one of them,
haven't you?

MR. NEWMYER: The whole book shows different
views of this particular tree space.

MR. QUINTER: I have no objection to the introduction
of the whole book on the same basis that it depicts the
condition as of the date which the pictures were taken,
which I think is noted on there for the jurors.

20 MR. NEWMYER: Yes, it was taken just the
other day.

(Book of photographs were marked Plain-
tiff's Exhibit No. 1, and received in evi-
dence.)

MR. NEWMYER: I will give Plaintiff's Exhibit No. 1
to the jurors.

BY MR. NEWMYER:

Q. I might ask you this question while they are looking at this (sic) pictures—

THE COURT: Now, if you want the jurors to examine the pictures—

MR. NEWMYER: I am sorry, Your Honor.

BY MR. NEWMYER:

Q. Miss Randle, you were walking in an easterly direction; is that correct? A. That is right.

Q. In other words, you were coming upon this tree space from the street; not from the sidewalk? A. That is correct.

Q. You had crossed the street there and were starting to cross that corner; is that correct? A. That is right.

Q. And you say that there were two men standing there. In other words, you mean they were standing on the actual sidewalk space which comes out to the curb? A. That
21 is right, and of course it necessitated by walking to the right—to their right. I couldn't push them aside.

Q. Now, did you have occasion to observe what you had stepped upon as you stepped over that curb onto the tree space? A. I didn't understand you.

Q. Did you observe what you had stepped on? A. Yes.

Q. Suppose you tell the jury what it was. A. Well, there is a metal stop sign that is several feet from the metal stob that I stepped on—

MR. QUINTER: I object to that, Your Honor. It wasn't a metal stop sign there from what I seen of the pictures. All I could see was a little picture of something.

THE COURT: I sustain the objection.

BY MR. NEWMYER:

Q. Can you describe the appearance of what you stepped on? A. Yes. It was a metal stob about two or three inches high.

MR. QUINTER: I object to that, a metal stop.

THE COURT: "Stob," she said.

THE WITNESS: It was in the shape of a horse shoe, but it wasn't very lucky for me. It went like that (indicating) and I think if you will observe—

22

BY MR. NEWMYER:

Q. Well, let me show you the photograph—

MR. NEWMYER: I would like at this time, if Your Honor please, to introduce four photographs which we have and four which the District has, all showing the same tree area.

MR. QUINTER: Well, I have no objection to ours. I can't say that I am not going to object to yours at this time. I object to them at this time until I have further opportunity to examine them. You can use mine if you wish.

MR. NEWMYER: I will use yours.

THE COURT: Do you object to yours?

MR. QUINTER: No, Your Honor, I don't object to my own. Do you want these in as a group or separately?

MR. NEWMYER: Mark them Plaintiff's Exhibits 2-A, 2-B, 2-C, and 2-D.

THE COURT: Are they introduced as Plaintiff's Exhibits?

MR. NEWMYER: For identification.

THE COURT: Well, mark them for identification.

(Four photographs referred to were marked Plaintiff's Exhibits Nos. 2-A, 2-B, 2-C and 2-D for identification.)

MR. NEWMYER: I have no objection. I will put them in evidence.

THE COURT: Let me see them please.

(Plaintiff's Exhibits Nos. 2-A, 2-B, 2-C, and 2-D were received in evidence.)

23

BY MR. NEWMYER:

Q. Miss Randle, I show you Plaintiff's Exhibit 2-D and 2-C—A. Did the District take this after the stob was removed?

Q. —and I point to something on here showing a small piece of metal. Was that in the approximate position of the metal stob on which you fell? A. It is in the approximate position. However, it looks—

THE COURT: You answered the question.

BY MR. NEWMYER:

Q. I am not asking you whether this photograph describes exactly the way it looked at that time to you, but whether or not that is in the same position? A. It is in the same position.

Q. Now, in what way is it different? A. It looks like it is deeper in the ground. It looks like it has been hammered down.

Q. Well, now, I show you two other photographs showing this same general area in which you fell? Of course, the sign is there which was placed by the District when they took the photograph, but aside from the sign? A. I would say it was the same tree and the same tree box.

MR. NEWMYER: I would like the jury to see these.

24 THE COURT: Very well.

MR. NEWMYER: I am advised that those were taken on November 16, 1950, and November 27, which would be about three months after the accident.

BY MR. NEWMYER:

Q. Miss Randle, I would like to show you another photograph and ask you whether or not this represents the object on which you fell? A. That is it. That is the object.

Q. And does the appearance on that photograph more accurately resemble that object than the photograph which you previously saw? A. Yes. This is a better picture. It is closer.

MR. QUINTER: May I see the photograph?

BY MR. NEWMYER:

Q. Is this approximately how it looked on the day you fell? A. That is correct.

MR. NEWMYER: I would like to introduce this in evidence, Your Honor.

MR. QUINTER: I object to it, if Your Honor please.

THE COURT: On what ground?

MR. QUINTER: There is no proof of who took the picture or when.

THE COURT: Well, if you insist on the photo-
25 grapher, I have to sustain the objection.

MR. NEWMYER: I am not introducing it to show who took the picture but I am introducing it as a description of what she has testified it looked like on the day she fell.

THE COURT: Nevertheless, I have to sustain it unless you produce the photographer.

MR. NEWMYER: We will have the photographer here then.

THE COURT: I don't have to so rule when these questions are not raised, but when they are I have to require strict proof.

BY MR. NEWMYER:

Q. On the day of the accident, what surrounded if anything this particular object, or what was near it on the gravel part? A. There was grass on the west side of the stop, which would have obscured it from my view until I stepped on it.

MR. QUINTER: I object to what she called, "The west side of the stop." There is no question there is any stop.

MR. NEWMYER: "Stob," she called it.

THE WITNESS: A metal standard.

MR. NEWMYER: A metal standard.

MR. QUINTER: What has actually been identified, Your Honor, is a projection from the ground, a metal projection from the ground. Now, what it is, we don't know, whether it was a stanchion or—

MR. NEWMYER: We do know. What you would call it—

26 THE COURT: She can only testify as to what she saw; not what it had originally been, but as she saw it before.

BY MR. NEWMYER:

Q. Let me ask you this question, Miss Randle: Did this particular metal stob resemble anything else you saw in that vicinity, or that you have seen in that vicinity?

MR. QUINTER: I object to that. There may be many metal stobs.

THE COURT: I overrule the objection.

THE WITNESS: May I answer?

THE COURT: Yes.

THE WITNESS: As I recall, it was the same shape as the standard holding the stop sign a few feet from it.

BY MR. NEWMYER:

Q. The same shape. And how about—was the metal also— A. The same shape, the same metal.

Q. Now, Miss Randle, what occurred—how did you fall in stepping on this object? A. I fell to the left and toward the tree, and of course—that is all.

Q. What part of your foot struck this object, or how did you step on it? Can you explain to the jury in some way?

A. My feeling is that the metal on which I stepped was just a little to right of center, which means that I would have stepped on it on the ball of my foot, but not under my
27 foot enough to stop me from being thrown to the left.

Q. Then the ball of your foot is what stepped on top and you fell over to the left; is that correct? A. That is my impression.

Q. And fell toward the tree; is that correct? A. That is correct.

Q. Did you fall all the way down? A. I fell all the way down.

Q. And what happened then? A. Well, I tore my suit and hose because evidently there must have been some sort of the roots of the tree, I suppose—

MR. QUINTER: Not what she supposes, Your Honor.

BY MR. NEWMYER:

Q. Well, you tore your dress and your stockings? A. Yes. It was a hard, rough fall.

Q. Did anyone help to pick you up? A. Yes, the young lady with me and then there was another gentleman there, another witness, and he came and helped pick me up. The two of them picked me up.

Q. What is the name of the lady that was with you? A. Well, at that time her name was Miss Jessie Brook.

Q. She has since married? A. That is right.

Q. Do you know her name at the present time? A. Mrs. Sudermann.

28 Q. And do you know who the man was that helped pick you up? A. His name was Sergeant Cortizas.

Q. What was done at that time after they picked you up? A. Well, I couldn't—I was in terrific pain and I couldn't put any weight on my foot, so they picked me up and help me there until I stopped shaking and had gotten over the shock of the fall a little bit.

I think the Sergeant wanted to call an ambulance and at that time, although I heard a crack when I fell, I didn't realize that the bone had broken and so I thought I would be all right in a little while and I wouldn't let them send for the ambulance.

Q. And so where did they take you or where did you go? A. They got me to the government infirmary.

* * * * *

41 BY MR. QUINTER:

Q. Do you recall whether it was raining or sunny?

A. I think it was pleasant.

Q. It was pleasant? A. I believe so.

* * * * *

45 Q. Do you recall the time you crossed 8th Street there, Southwest, just before you stepped up to the curb and stepped into the tree box whether or not you were conversing at that time? A. No. At that particular time

Miss Brook spoke to the two gentlemen on the left because they worked at the Department of Agriculture, the same place I did, and they had gone to this cafeteria for lunch. A great many of us in main Agriculture and South Agriculture go to this other cafeteria for lunch.

Q. So, as you and Miss Brook were stepping up
46 to the curb there she spoke to these two gentlemen who were on the north side of the tree there at 8th and E? A. That is correct.

Q. And at that time you looked over there too and spoke to them, did you? A. No.

Q. Where were you looking? A. Where was I looking? Well, two years ago—I wouldn't say that I was either looking at them or at Miss Brook, but my impression was that I was looking at the curb to step up off of the street.

Q. Did you look into the tree space at all? A. I saw some grass there, yes.

Q. How much grass was there? Was the tree space filled with grass there? A. No, there seemed to be just a little grass right in the corner.

Q. I show you Plaintiff's Exhibit No. 2-D and ask you whether that fairly depicts the conditions? A. May I see all of your pictures?

Q. I will show them to you one at a time. Does that fairly depict the tree box at the time with respect to the grass? A. The grass had been removed.

Q. The grass had been removed? A. Yes.

* * * * *

48 Q. Now, had you been in this area for sometime working at the Department of Agriculture? A. I think I had been there about six months or so.

Q. About six months or so? A. I believe that is correct. It may have been almost a year. I don't recall.

Q. And during that time did you often go down to have lunch by yourself or with someone else in this building in the annex down there at 8th? A. You asked, "often"?

Q. That is right, did you go there often? A. Occasionally.. I had been there more than once.

Q. Approximately how many times do you think you had been there? A. I don't recall. It could have been four times; it could have been more.

* * * * *

49 BY MR. QUINTER:

Q. Now, on these other occasions that you went down to have lunch down around 7th and Independence Avenue, did you have occasion to walk through that tree space, or observe it? A. Well, I don't recall that either, but it is quite possible that were we fortunate enough to arrive at the tree at the time that no one was to the left, and in that case we would have gone right on—and, as I recall, I believe that was the only time that I had to go around because people were there.

Q. And because there were these two men standing to the north side of the tree at the curb it was necessary for you to walk through the tree box? A. It was necessary, yes, necessary for me to go to the right.

* * * * *

59 Q. Now, when did you first observe this metal stanchion that you say that you fell over? A. While I was still on the ground and before they lifted me up.

Q. I thought at that time you were in a state of shock and trembling all over? A. So I still had my eyes. Naturally I wanted to know what on earth had happened.

Q. And did you look back and see this stanchion in
60 the ground? A. No, I looked at it before they even lifted me up.

Q. Well, you just looked back. You fell face forward, I presume. A. Well, I know my leg was buckled under me. It is quite possible that I looked back.

Q. It doesn't make much difference. But you did see it?

A. I do recall that I could see it very clearly looking at it from the east side, but I couldn't see it from the west side because of the grass.

* * * * *

Q. You stated on direct examination, did you not, that it was of the same shape and the same metal as a stop sign a few feet from it? A. Did I say similar?

Q. The same metal as the stop sign a few feet from
61 it and the same shape. You can say yes or no whether you said that. A. I think I said that.

Q. I show you this picture, which is Plaintiff's Exhibit No. 2-A and point out a stop sign there to you and ask you if that is the stop sign to which you refer? A. I believe so.

Q. That is the one to which you refer.

MR. QUINTER: May I show that to the jury?

THE WITNESS: The hollow shape—

THE COURT: Wait. You have answered the question.

(Thereupon, Plaintiff's Exhibit No. 2-A was passed among the jurors.)

* * * * *

67 Q. A friend took some snapshots. That was about three weeks after the accident and at that time you observed the stanchion there, didn't you? A. Yes.

Q. And you observed the stop sign some feet back
68 of it, some maybe 15 feet back of it? A. There was a stop sign there, yes.

Q. Was it at that time that you reached the conclusion that it was the same shape or the same metal as the stop sign a few feet from it? A. After observing the horse-shoe shaped stob that I fell on, I have observed quite a number of "Do Not Enter" and "Stop" signs and all types of signs put up by the city and every one I have observed has that same peculiar shape.

Q. You say they were all put up by the city, or do you know whether these signs that you are talking about were

put up by the federal government? A. No, I don't know who they were put up by.

Q. You just said they were put up by the city. You don't know whom the signs were put up by, do you? A. No.

Q. Now, as a matter of fact, you don't know whom this sign was put up by in the tree space, do you? A. Are these signs put up by private people?

Q. I am asking you the question, young lady. You don't know who put up this particular stanchion. Evidently there may have been a sign above it, but you don't know who put that particular stanchion in the ground, do you? A. I don't know the actual person, no.

Q. Well, you don't know by what authority it was done, whether it was the federal Government, whether it was a private person, whether it was the District of Columbia, or whether it was put in there by some kids that may have picked it up and pounded it in the ground? You don't know who put it in there, do you? A. I wouldn't say some kids did it.

Q. You don't know? A. No, I don't know.

* * * * *

CARLO A. MAGGI

was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEWMYER:

Q. What is your full name, sir? A. Carlo A. Maggi.

Q. What is your profession, Mr. Maggi? A. I am a professional photographer.

Q. How long have you been a photographer? A. 20 years.

70 Q. Where are you located now? A. I am at 1603 K Street.

Q. Now, Mr. Maggi, do you recall an occasion in 1950 when you took some photographs at 8th and Independence Avenue, Southwest? A. I do.

Q. And do you know who asked you to take them? A. Miss Randle.

Q. And did she accompany you to the place? A. She did.

Q. Do you recall what month it was? A. I don't.

Q. Do you have an idea of approximately what—A. I think it was in the fall.

Q. Now, I show you four photographs here and ask you whether or not you can identify them? A. Yes, sir.

Q. Are those the photographs that you took? A. They are.

Q. What kind of camera did you use? A. I used a Rolleiflex.

Q. And did you develop those pictures yourself? A. I did.

Q. Do those pictures accurately reflect the condition you observed at the time? A. They do.

71 Q. You didn't touch or affect anything that you were photographing? A. No, I did not.

Q. You just photographed a space that was pointed out? A. That is correct.

Q. I notice on the back of these it says, "Photographics." Was that your firm? A. It still is. It is just a trade name.

MR. NEWMYER: I would like to introduce these in evidence.

MR. QUINTER: May I examine the witness first?

CROSS EXAMINATION

BY MR. QUINTER:

Q. What size camera—did you say it was a Rolleiflex?

A. Two and a quarter by two and a quarter.

Q. Two and a quarter by two and a quarter? A. Right.

Q. In other words, these are blown-up pictures? A. Any

picture has to be blown up to a legal size which is eight by ten.

Q. Well, actually, two and a quarter by two and a quarter would be a picture about that size (indicating), wouldn't it? A. It would be smaller than that.

Q. It would be about that (indicating)? A. Yes

72 Q. So these are blown-up pictures? A. That is correct. That is the correct procedure. I did investigation work in the Army and all and we always—

Q. I didn't ask you that question.

MR. NEWMYER: Let him explain.

THE WITNESS: I am trying to explain to you that is proper—

THE COURT: Just a minute. Just answer the question. Proceed, Mr. Quinter.

MR. QUINTER: Do you want to mark these for identification?

THE CLERK: Plaintiff's Exhibits Nos. 4-A, 4-B, 4-C, and 4-D.

(Photographs were marked Plaintiff's Exhibits Nos. 4-A, 4-B, 4-C, and 4-D for identification)

MR. NEWMYER: I think it might be well if counsel would define "blown up." I don't know what the inference is.

BY MR. QUINTER:

Q. Counsel here wants an explanation of what a blown-up picture is. Will you tell us what a blown-up picture is?

A. Well, I presume you mean it is an enlargement and that is—I believe here in the District the police photographers use a four by five camera, which is a standard camera. I have a four by five camera too, but at the time I had this particular camera in the car and I used the Rolleiflex because I felt that we could take the various locations shots of it. In other words, it has a seven and a half centimeter lens, so there is no distortion whatsoever because the lens for that particular camera is propor-

73

tional to the same. In other words, the focal entrance of the lens, which is seven and a half centimeters would be the same as using a four by five Speed Graphic with a 165 millimeter lens on it. So everything is relative.

* * * * *

75 Q. Well, you have no recollection of what Miss Randle did? A. No, I do not. I was told to go to the corner and I would find an object protruding and to photograph it from various locations.

Q. Now, this is the condition as you found it, this picture, Plaintiff's Exhibit No. 4-A. That is the condition as you found it? A. That is correct.

Q. Now, I show you this and ask you whether or not whether anybody, prior to the time you took the picture, scraped away anything from the front of that stake? A. I wouldn't say so because if you notice here it is all pretty even, I mean. There doesn't seem—you will notice the photograph, the shot itself, all—there isn't any fresh leaves or anything in there.

Q. Well, I show you this photograph labeled Plaintiff's Exhibit No. 4-D and ask you right in front of
76 the stanchion there whether there—A. Now, this is practically the same. In other words, this was a shot more as a duplication for myself to make sure, you know, that sometimes a negative might get scratched or something. It is actually just a little moved over, you see.

Q. Now, examining this picture again, Plaintiff's Exhibit No. 4-D, in looking at that stanchion I see there is a lighter color down here along the bottom than there is along the top. You see what I am talking about—about half way down, the part that projects is lighter than the top? A. You mean a gradation?

Q. No, I mean a lighter—lighter in color. A. Well, you mean the gradation—in other words, it goes from a black to a gray.

Q. It goes from whatever color it is like to a gray. You see that? A. Yes.

Q. Now, at the time you took the photographs, do you recall whether or not that was mud or what it was on there?

A. I don't recall.

Q. You don't recall? A. No.

Q. Let me ask you this question: At the time you
77 took these pictures do you recall how far this stan-
chion protruded from the surface of the tree space?

A. No.

Q. Was it just a small distance? A. I wouldn't be able to—

THE COURT: That doesn't have anything to do with his taking the pictures.

* * * * *

78 MR. NEWMYER: I would like to introduce these.

THE COURT: I do not mean you cannot ask the photographer further about these, but at the present I am admitting these exhibits.

(The photographs previously marked Plaintiff's Exhibits Nos. 4-A, 4-B, 4-C, and 4-D were received in evidence.)

* * * * *

THE WITNESS: Here is a red grease pencil for that purpose.

(Thereupon, Mr. Newmyer marked the directions on Plaintiff's Exhibits Nos. 4-A, 4-B, 4-C, and 4-D, which were then passed among the jurors.)

* * * * *

81 ANTONIO MARIO CASANOVA CORTIZAS

was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEWMYER:

Q. What is your full name? A. Antonio Mario Casanova Cortizas.

Q. And where do you live, Sergeant? A. 215 8th Street, Southwest.

Q. And you are in the United States Army? A. Yes, sir.

Q. And how long have you been in the Army? A. Eighteen years.

82 Q. And where are you stationed at the present time? A. At the Institute of Pathology, Armed Forces.

Q. Institute of Pathology? A. Yes; Armed Forces.

Q. What are your duties? A. I do scientific work with the doctors. Actually, right now I work at Walter Reed; work in surgery with the doctors applying artificial pigment, or tatooing the scars of Korean casualties, and so on.

Q. Do your duties involve plastic surgery? A. Many.

Q. Now, Sergeant, we are inquiring about an accident which occurred to Miss Randle on August 24, 1950. Do you recall that? A. Yes, I do recall.

Q. Where were you at the time? A. Back of her about 15 feet; around that.

Q. Was your office near the place where she was injured? A. Yes, about, oh, 200 feet. I was out to lunch at the time.

Q. Now, will you tell the jury just what you saw at that time and place; that was at 8th and Independence Avenue, Southwest? A. Yes, sir. I was at lunchtime and I noticed two young ladies walk in front of me, and also two
83 men on the corner.

Suddenly, as I see, she was on the ground. So I see what I could do. I went up and picked her up and I noticed—I asked her not to make a step. I investigate and I went on with my fingers and to see if there was any compound fracture. I am trained for that. And I felt it and she was in pain, and I see no exposed bone, but there was

simply a deformation of the muscular—well, there was more or less already I would say—

Q. Swelling? A. Swelling.

Q. Now, did you see on what she had fallen? A. Yes.

Q. Will you describe it to the jury? A. An object, an iron object exposed in the ground, and call it a box or what you—the ground box of a tree—and it was I would say about two and a half or three inches exposed from the ground. Eventually the rain was washing the ground leaving it exposed.

Q. You mean it protruded two and a half or three inches?

A. I would say two and a half or three inches, no more, more or less. I do recall that.

Q. Now, I show you a picture which has been marked Plaintiff's Exhibit No. 4-D. A. Exactly, yes, that is
84 the one. That is it. That is the one.

Q. Is that what you saw? A. Yes.

Q. Was she lying next to that? A. No. She was, well, close by away from it because she stepped up and tumbled. And I run up and, however, I didn't actually see the foot hit it.

Q. You didn't see her foot hit it; you were further back from her? A. I was—well, I never look at feet. I look up—

Q. But when you got to her you looked down and saw that next to where she was lying? A. That is right.

Q. Was she in pain at the time you picked her up? A. Yes, she was quite in pain. I told her to sit down—not to step—I advised her to sit down there and to try to call an ambulance, or the office where she works. And I left her there sitting down with her friend, a young lady with her. That was my advice I give her, and whether she obeyed that I don't know after what happened.

MR. NEWMYER: I think that is all.

CROSS EXAMINATION

BY MR. QUINTER:

Q. You never knew Miss Randle prior to this day? A. I can't hear you, sir.

85 Q. Had you ever known Miss Randle prior to the date of the accident? A. Before; no, sir.

Q. Have you talked to her since then? A. No, sir, I pass in here but she—

Q. I can't understand you. A. No, sir.

Q. You haven't talked to her at any time since the happening of the accident? A. This morning I recognized her. I say, "Good morning," and that is about all.

Q. In other words, you haven't discussed with her, or have you discussed with her counsel the defect there, the alleged defect? A. No.

Q. The stanchion is what I am talking about. You haven't discussed that with counsel.

Now, could you—

MR. NEWMYER: Does he know what "counsel" means?

MR. QUINTER: Attorney.

MR. NEWMYER: What he means is did you talk with me about the accident before you came in here?

THE WITNESS: Yes, I saw him. I don't know about this procedure. I saw him. I report to him so I talk to him, of course.

86 BY MR. QUINTER:

Q. Did you just tell him what happened? A. He asked me—just shake hands—and not much. I didn't say very much about the case—just he told me about the case. I said, "Yes, I remember the young lady."

Q. Could you be wrong that it was two or two and a half to three inches—it might be three quarters of an inch? A. Of what?

Q. How far this stanchion projected from the ground? A. Oh, no, I happen to be an artist, myself.

Q. You happen to be what? A. An artist.

Q. An artist? A. Observation is very important. I would swear it was two and a half or three or—three would be too much—but there was—I suppose it was about two and half; maybe a little less.

Q. All right, sir, you worked some 200 feet away from the place where the accident took place? A. Yes.

Q. Would that be west on Independence Avenue? A. I am not—west and south—I work at the Institute of Pathology—it seems to me south.

86 Q. Can you talk a little bit more slowly? A. I was out of the building at the time.

Q. I understand but is your office some 200 feet west on Independence Avenue? A. Toward the Agriculture Department.

Q. That is west. A. That would be—

Q. That would be west on Independence Avenue. A. Now, I know.

Q. Now, where do you go to eat lunch? A. At the what you call it—the 7th and Independence Avenue.

Q. 7th and Independence? A. Yes.

Q. By the way, how long have you been there at your present office, 200 feet up the street from 8th and Independence? A. How long I been in what? I don't know—

Q. How long have you worked at this same office that you were working in on the day of the accident? A. I go to lunch, you mean?

Q. No, no, you don't understand me. On August 24, 1950, how long had you been working at the same place 200 feet up the street? How long had you been working there, how many months, days, or years? A. Oh, I would say roughly about five years.

88 Q. You had been there about five years? A. Yes.

Q. And during that time you went down the street, did you, to eat lunch at 7th and Independence almost daily? A. Well, I go different ways to lunch. Sometime I come in

town, but I usually eat at 7th and Independence. And sometimes I eat a snack. Across the street from the Institute we have a little one. And sometimes I go out even for air; but at the time I was out, if you ask me what time, I don't know. If you ask me if it was before lunch or after, I don't know.

Q. What I am trying to find out is during the five years you were working 200 feet up from where this accident took place—A. Yes.

Q.—did you often go down to 7th and E to have lunch?
A. Why, yes.

Q. Many times? A. Yes, 7th and Independence many times.

Q. And in going there did you go down Independence Avenue and cross Independence Avenue on the south side there at 8th and Independence? A. Yes.

Q. And during that time did you have occasion to
89 walk through that tree box yourself? A. Oh, I go through there every day.

Q. Went through there every day? A. Yes.

Q. You are an artist? A. Yes, sir.

Q. And you are supposed to have great powers of observation? A. Well, it is my training; not powers.

Q. Now, in all those five years prior to this accident you never saw this protrusion from the ground, did you? A. I observed this hold, the wash in the ground, which it happens that I have a club, childrens' club, there in my neighborhood organized, fighting against delinquency, have my own, and it is their job to go around and pick up broken glass, all hazards, their own self.

Q. And that is in this particular neighborhood? A. Yes, right there.

Q. And that encompasses the corner there at 8th and Independence? A. Yes, and I am familiar with every tree because the adults have a tendency to throw beer bottles there and the children have to pick it up.

Q. Now, you were familiar with this particular
90 tree box? A. Very much.

Q. With your powers of observation as an artist?
A. Yes, sir.

Q. In five years you never saw the stanchion sticking up there, did you? A. Probably seen it, but not that I recall well.

Q. It didn't appear dangerous to you? A. Yes, it appeared dangerous, worse than that—right now you go over there, there is about three inches exposed right there now, more than that. The ground is washed.

Q. What do you mean, the stanchion is still sticking up three inches. A. No, sir, the box which is there is exposed right there about that much. Now, everyone that walks—"poop."

Q. That is like throughout the city; that is so the tree can get some water? A. Well, the tree is the wrong size right in the middle of the sidewalk, and personally—

Q. Now, you have seen this tree box many times? A. Many times, yes, sir.

Q. But in all those times that you saw it you never yourself observed this stanchion? A. No, sir.

91 Q. Never saw it? A. I can't swear to that. There are many things—

Q. But if you had seen it and thought it was a dangerous defect you would have done something about it, or had your boys go to do something? A. Well, we do more things than that right now.

Q. So if you saw it you didn't think it was dangerous? A. I never think it was dangerous because it is not sharp. We have to turn to sharp things, broken glass, buried material like bottles. We do dig them out.

Q. You just don't remember having seen that thing before this accident, do you? A. No.

Q. Although you traversed that many days and have wonderful powers of observation? A. That is right.

Q. Now, do you actually, yourself, know over what Miss Randle did fall? A. Actually know what?

Q. Do you know over what she fell, really?

THE COURT: You mean what caused her to fall?

BY MR. QUINTER:

Q. What caused her to fall; do you actually know? A. Yes.

Q. How do you know? A. Well, it is obvious it was that thing there.

92 Q. You didn't see her stumble over it. You saw her fall. A. I saw her right in the air.

Q. In the air? A. And she looked back instantly.

Q. She could have stumbled over her foot—

MR. NEWMYER: He hasn't finished yet.

THE WITNESS: My observation was looking at her body to tell you the truth

BY MR. QUINTER:

Q. Well, actually, you don't know what she fell over. You just guessed she fell over this stanchion, right? A. I presume.

Q. You just presume? You guess? A. That is right.

REDIRECT EXAMINATION

BY MR. NEWMYER:

Q. You were the first one to her, weren't you? A. That is right, and we discussed by that instrument.

Q. I mean she told you she had stepped on it and pointed it out? A. Well, she looked back where it was and, naturally, it was the human thing to find out what caused it, the natural human thing.

MR. NEWMYER: That is all. Thank you very much, Sergeant.

* * * * *

93

JESSIE BROOK SUDERMANN

was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEWMYER:

Q. Your name is Jessie L. Sudermann? A. I go by the name Jessie Brook Sudermann.

Q. You are now married to a Colonel Sudermann in the Air Force? A. Yes.

Q. He is overseas in Germany? A. Yes.

Q. You were formerly Jessie Brook? A. Yes.

Q. Now, Mrs. Sudermann, we are inquiring about an accident that occurred to Miss Randle back on August 24, 1950. Were you with her at the time? A. I was.

94 Q. And that was at the corner of 8th and Independence Avenue, Southwest? A. Yes, sir.

Q. Now, will you tell the jury just what occurred? A. We were walking along that street to go to lunch and so I think Miss Randle was picking up some kind of a personnel record in one of those buildings there. And then we continued on down the street—and maybe it was before we got to that—and so there were two gentlemen who we had worked with was coming up the street and I spoke to them.

And I was walking around and it seems as though at this particular point there is a tree in the middle of the sidewalk where pedestrians should have the right of way to walk. And this was also not paved—I mean no concrete there. It was gravel and stone. And sometime along the line, why someone had sawed off a standard, and there that stob was sticking up there.

Well, after speaking to these fellows, why I had walked around and so that left Miss Randle to walk between the tree and this point. So she stepped on it and I turned around and she seemed to be in great pain and I couldn't imagine what in the world had happened. So we walked back up to the. I helped her walk back up to the dispensary.

Q. Now, before you go on: Here is one of the small snapshots that has been admitted in evidence. Is that the

tree space at the corner that you walked around?
 95 I am showing you Plaintiff's Exhibit No. 4-D. Is
 that the piece of metal that you referred to that she
 stepped on? A. Yes.

Q. Does this picture show just about the way it looked
 the day that she fell? A. Yes, because I went—I made a
 point to look at it again after I saw her in great pain.

Q. You say she was in great pain? A. Yes, trembling all
 over.

Q. And did this sergeant come over and help you with
 her? A. Well, yes, there was some military person that
 came and I presumed that he was a sergeant because I was
 not acquainted with him.

MR. NEWMYER: I have no further questions.

CROSS EXAMINATION

BY MR. QUINTER:

Q. Now, you say there was a metal standard stick-
 ing up in this place where there was gravel? A. You see,
 sir, it had been sawed off and it apparently was on the level
 of the concrete part where the spot should have been con-
 creted, you understand.

Q. You saw it there, did you? A. Yes.

96 Q. Had you seen it there before? A. Why, No. I
 mean—

Q. Did you see it that day prior to the time Miss Randle
 fell over it? A. Of course, not, because I was at work.

Q. Because what? A. Because I was working and I
 could not leave my desk.

Q. As you two were walking along together did you see
 it prior to the time that she fell? A. No, sir. I just said
 that I had spoken to a couple of friends there who we work-
 ed with.

Q. Now, you say after she fell you did observe it then?
 A. Because I made a point.

Q. What is that? A. I made a point to look at the spot where she had fell.

Q. And you subsequently went back, you and Miss Randle, and looked at it again, did you? A. We were standing there. We didn't move an inch. So we did look because there was no other place to go.

Q. Did Miss Randle go down and sit down on a bench? A. Of course, it has been about two or three years ago and there has been a lot of activity that has happened in my life and I can't recall all of those little teeny details.

Q. Well, you remember the details that there was a
97 standard in the ground there? A. Yes.

* * * * *

101 Q. Now, had you been down on other occasions
prior to the day of this accident to 7th Street where
102 you ate lunch in this government cafeteria? A. Of
course.

Q. Many occasions? A. Why, sure.

Q. Very many? A. Well, I wouldn't say every day because you get tired of eating foot in the same spot.

Q. No, but you had been down say over a period—how long had you worked at the Agricultural Department prior to this accident? A. '48.

Q. Since 1948? A. Yes.

Q. This took place in 1950, and you had been down on many occasions, had you? A. Oh sure.

Q. All right, now, on those various occasions had you always gone down Independence Avenue to get to the restaurant—down to the government cafeteria at 7th and Independence? A. Well, I wouldn't like to commit myself that I always go that one particular route.

Q. That is the shortest route, isn't it? A. Yes, it is the shortest.

Q. The one you generally took? A. Yes, I think so.

Q. And you crossed right across by that tree many
103 many times where Miss Randle fell, haven't you? A.
Well, sure, every time I go by there I pass by.

Q. Now, did you at any time observe the broken stanchion
over which she allegedly fell? A. Well, all through that
section of the city, I mean—

THE COURT: Just answer the question. Read her the
question.

(Thereupon, the pending question was read by the re-
porter)

THE WITNESS: As I say, it has been so long—

BY MR. QUINTER:

Q. Prior to the date of the fall? A. It has been so long
and there are other places along—

Q. Did you ever observe this particular broken stanchion
prior to the day of Miss Randle's fall? A. That is what I
was trying to tell you.

Q. Well, you either did or you didn't. A. I don't remem-
ber that particular spot from—

Q. All right, you don't remember. A. There are too
many around there.

MR. QUINTER: I think that is all.

* * * * *

104 Q. Well, would you look this over and see whether
or not they mailed you a form such as this, which
you had to fill out, and whether or not you stated what is
stated on here? A. Let's see, yes, they did mail me a form.

Q. All right, now, if you will look—A. Or someone did.

Q. Now, would you look that over and see if you recall
whether that is the answer that you gave the District Gov-
ernment when they mailed you that form? A. Yes.

105 Q. Now, this is a copy then of what you sent them
back; is that right? A. So far as I know, yes.

Q. Now, this statement, when it asked you, "Give to the
best of your knowledge a full account of the accident as wit-
nessed by you, stating what first attracted your attention

thereto and any other information bearing upon the fact," and your answer was:

"Miss Randle and I were walking near the Escanaba Building where Miss Randle picked up a personnel record. She stepped on a metal, sawed-off standard staff and appeared to be in great pain, trembling from her head to foot. Was unable to move her left foot."

And then it asked for any additional facts you would like to express and it says, "Please identify the size and height of the limb from the subsurface to the sidewalk." And your answer was: "No tree limb involved. A metal, sawed-off standard staff."

Is that correct? A. Yes.

Q. And you told the District Government what it was she had fallen on in this statement; is that right? A. That is, yes.

MR. NEWMYER: That is all.

* * * * *

109 THE CLERK: Plaintiff's Exhibit No. 5 for identification.

(Thereupon, statement was marked for identification as Plaintiff's Exhibit No. 5.)

MR. QUINTER: I have no objection.

THE COURT: It will be admitted.

(Thereupon, statement previously marked for identification as Plaintiff's Exhibit No. 5 was received in evidence.)

* * * * *

JOSEPH PARLON

was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEWMYER:

Q. Whom do you work for? A. Department of Highways.

Q. For the District Government? A. The District Government.

Q. How long have you been in that department? A. 29 years.

Q. Does that department handle the placing of
110 street signs? A. Yes, sir.

Q. On the highway? A. That is right, sir.

Q. I just want to ask you one question: I show you a photograph which has been marked Plaintiff's Exhibit No. 4-D and ask you what that metal piece in the ground is? A. That looks like the same type of pole that we use.

Q. The same type of pole that you use? A. Yes, sir.

Q. And is that used for stop signs and no parking signs? A. That is correct, sir.

Q. And is that a base of a pole, or is that a separate piece that the pole fits in? A. That there is part of a pole, part of an eleven foot six section.

Q. Which has been sawed off? A. Which is the way it apparently looks to me, sir.

Q. What is the practice when you move a pole? A. Well, in moving these poles, if it is possible we try to eliminate them by taking them out of the ground; if not, we generally saw them off and drive them into the ground.

Q. Saw them off and drive them into the ground? A. Yes.

Q. And if for any reason over a period of time the
111 ground level sinks, that would mean more of the pole
would be exposed; is that right? A. That would be possible, yes, sir.

Q. It would take a considerable time, wouldn't it? A. Yes, sir.

MR. NEWMYER: That is all.

CROSS EXAMINATION

BY MR. QUINTER:

Q. Mr. Parlon, you are head of the sign department, aren't you? A. I am trade foreman in charge of the signs and the marking unit, yes, sir.

112 BY MR. QUINTER:

Q. Do you have any record of ever having placed a sign of any type on the southeast corner of 8th and Independence Avenue, Southwest? A. Yes, sir.

Q. And when was that sign installed? A. October 2, 1942.

Q. And what type of sign was that? A. Stop sign.

Q. And I show you this picture identified as Plaintiff's Exhibit No. 2-A and ask you if you can identify that sign there? A. That is right, sir.

Q. Is that the stop sign that was installed in 1942?

MR. NEWMYER: I object to that question on the ground that he hasn't said that he knew the exact location.

THE WITNESS: I don't know the exact location of the sign, but according to the record here the stop sign has been placed there and has never been removed from any location at that particular corner.

BY MR. QUINTER:

Q. Now, at that particular corner—look at this picture, Plaintiff's Exhibit No. 2-A, at the corner there of 8th and Independence Avenue, Southwest, the southeast corner: Is there any other stop sign or any other sign on that
113 corner? A. No, sir.

MR. NEWMYER: Are you asking him from the picture?

MR. QUINTER: From the picture.

THE WITNESS: No, sir.

BY MR. QUINTER:

Q. All right, now, have you made a search of your records with respect to signs? A. Yes, I have, sir.

Q. Have you a record of any other sign other than the sign shown in this picture being erected at the corner of 8th and Independence Avenue? A. Only on Independence Avenue.

Q. But not—A. Not on 8th.

Q. Not at 8th? A. No, sir.

Q. Now, were you able to find any record in your department of any sign having ever been taken down by the sign department at the corner referred? A. No, sir.

MR. QUINTER: That is all.

114 BY MR. NEWMYER:

Q. When a crew goes out to install a sign and finds a particular location to be not appropriate to place that sign, then they could put it in the ground and then move it, couldn't they?

MR. QUINTER: Wait a minute. I object to the question.

THE COURT: I sustain the objection.

BY MR. NEWMYER:

Q. Well, Mr. Parlon, have you ever gone out and placed signs yourself? A. Yes, loads of them. That is where I started in 1924 until 1936 I placed signs.

Q. There are literally hundreds of thousands of signs in the District; is that right? A. The last survey we made there were 72,500 of them.

Q. And although you keep the records you are not willing to say that there is a record of the exact sign for every one, are you? A. Well, not at this farthest date, but since 1950 we have been attempting to spot check each and every sign in the city.

Q. That is since 1950? A. Yes, sir.

MR. NEWMYER: That is all.

115 RECROSS EXAMINATION

BY MR. QUINTER:

Q. But you have records prior to 1950 with respect to the placement and removal of signs? A. That is right, sir.

Q. But now what you are doing is making a spot check and making sure each of the signs is in place? A. That is right, sir.

MR. QUINTER: That is all.

FURTHER REDIRECT EXAMINATION

BY MR. NEWMYER:

Q. You don't guarantee them prior to then? A. Well, we don't guarantee them, no, sir.

MR. NEWMYER: That is all.

THE COURT: You are excused.

* * * * *

124 BENJAMIN PAUL BLAINE

was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEWMYER:

Q. What is your full name, sir? A. Benjamin Paul Blaine.

125 Q. Mr. Blaine, whom are you employed by? A. National Capital Parks.

Q. And you work for the federal government of the United States? A. Yes, sir, Department of Interior.

Q. Now, at my request have you examined your records to see whether or not the United States Government has ever had a sign at the corner of 8th and Independence Avenue, Southwest? A. We don't keep no records, sir, for the signs that we install. What I mean, we keep a record of the sign that we make, the number, but as far as signs that were installed we just take them by locations.

Q. Now, does the United States Government have any signs at that location? Do they have any control over that corner? A. No, sir, never had.

Q. And that is beyond your jurisdiction; is that right? A. Yes, sir.

Q. And you would have no occasion for installing signs there? A. No sir.

MR. NEWMYER: That is all.

CROSS EXAMINATION

BY MR. QUINTER:

Q. That is all government-owned property right
126 in that area, isn't it? A. I wouldn't say. I work
for the—

Q. There was a WAC or WAVE barracks there, wasn't
there? A. That wouldn't come under our jurisdiction.

Q. But it would come under the jurisdiction of the other
branches of the federal government. You are not the only
one that installs signs in the District of Columbia? A. No,
sir, I install signs for the park police in the park areas.

MR. QUINTER: Very well.

REDIRECT EXAMINATION

BY MR. NEWMYER:

Q. And the signs that any government agency wants in-
stalled is done through the park police, is that right? A.
No, sir.

Q. It is not? A. No, sir.

Q. Well, don't they have to get the authorization of the
National Capital Parks? A. No, they would probably put
up their own signs. We have through the parks—we put
our signs up through the park areas. The District puts them
up all through the other streets. Now, this one particular
location would come under District Government.

Q. That is right, and the District, even if they
127 didn't install a sign there, would have to authorize
a sign there for some other government agency? A.
That is right.

MR. QUINTER: I object to that. How would he know
if the District would have to authorize it?

THE COURT: Sustained.

MR. NEWMYER: That is all. I have nothing further,
Your Honor.

MR. QUINTER: At this time, Your Honor, I suppose you might excuse the jury. I would like to make a motion.

THE COURT: Very well, let the jury step out.

(Thereupon, the jurors withdrew from the courtroom.)

THE COURT: I will give you ten minutes.

MR. QUINTER: Your Honor, I want to move to dismiss the complaint at this time, first, for the reason that the plaintiff has failed to prove the allegations of paragraph three of the complaint, as Your Honor has permitted him to amend.

Has Your Honor seen the amendment today?

THE COURT: Yes.

MR. QUINTER: Now, he has alleged in the amendment that on or about August 24 the pedestrian was caused to fall and sustain personal injuries by stepping upon a projecting metal U-shaped base imbedded in the sidewalk tree space located on the southeast corner, et cetera, which space

was under the control of the defendant, and said fall
128 was due to the negligence and carelessness of said defendant through his agent, servant, and employees in failing to maintain said tree space in a reasonably safe condition in failing to remove therefrom the said metal base, which it had placed therein, and failed to remove after actual or constructive notice thereof, and which constituted a hazard, a menace, and a dangerous obstruction.

Now, there isn't a scintilla of evidence here that we installed it there.

THE COURT: I think it is immaterial whether you installed it or not. It would be simply a matter of testimony.

MR. QUINTER: There is no testimony, there is no evidence to the fact that we did install it. There is likewise no evidence that we removed it or that we cut it or that we did anything to it. The evidence is that this was a station—

THE COURT: The gist of the case is that that metal object was there in that parking place. By "parking," I

don't mean parking for cars but I mean in the sense of parking—it is not covered with concrete.

MR. QUINTER: Well, that may be what the plaintiff intended her case to be, but that isn't what she alleges, Your Honor. That is my point.

THE COURT: It is sufficient to go to the jury.

MR. QUINTER: Well, what I am trying to say, Your Honor, is that she alleges something entirely different from that. She says that in failing to remove
129 this said metal base, through its agents—

THE COURT: I think that is the gist of the case under the plaintiff's testimony, the testimony of the plaintiff and witnesses, that there was that obstruction and it was negligently permitted to remain there by the District.

MR. QUINTER: Now, Your Honor overrules me on that.

The second question of the complaint I don't believe is exactly the same as you gave it to me yesterday?

MR. NEWMYER: Yes.

MR. QUINTER: It is?

MR. NEWMYER: Yes, exactly.

MR. QUINTER: It seemed to me at that time you said, "If negligent." You had "negligently and carelessly"—

MR. NEWMYER: No, no, and by the way you forgot that there is a coma after the word "condition." There are two allegations: Failing to maintain the tree space in safe condition; and then another one, failing to remove the metal stanchion.

MR. QUINTER: Secondly, Your Honor, I would like to move to dismiss on the ground that there has been no proof of any notice to the District of Columbia, actual or constructive.

THE COURT: I think by the very nature of the situation that would be implied. There is no direct testimony that anybody saw it there for that long, but
130 there is evidence I think from which the jury can find that it was there for a long time.

MR. QUINTER: Well, the only evidence that I can see that is before the jury is that on this particular day this person fell over it. Other people have traversed the same place many times and have not seen it. I don't know whether it was put in the night before or whether it was driven in there by children, or how it was driven in there. It may very well have been now—it is conjecture as to how it was in there. There was no testimony as to whether it was old, whether it was rusty, and there is no testimony that showed any length of time that it could have been there.

THE COURT: I overrule the motion.

You can, of course, move again at the conclusion of all evidence, and if the verdict should be against the District renew your motion after the verdict.

* * * * *

131

OSCAR J. AVALLONE

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUINTER:

Q. State your full name, please. A. Oscar J. Avallone.

Q. Where do you live? A. I live at 2765 Naylor Road, Southeast.

Q. Where are you employed, sir? A. District Government, Corporation Counsel's Office, Inspector of Claims.

Q. How long have you been a member of the office of the Corporation Counsel? A. Nine years.

Q. And during that period of time you have been in the office of the Inspector of Claims? A. Yes, sir.

Q. Now, did there come a time when your office received a notice of a claim by Miss Randle? A. Yes, sir.

Q. Do you recall about when that was? A. It was before November 11—November 16, 1950. The exact date we received it; I don't recall.

Q. Now, as a result of the receipt of that notice,
132 what did you do? A. I visited the scene of the reported incident and the location as given to me by the letter of claim.

Q. And where was the scene that you visited? A. 8th and Independence Avenue, Southwest.

Q. And what if anything did you look for there? A. When I first got there I examined the sidewalk area.

Q. Where, what corner? A. At the southeast corner of 8th and Independence Avenue.

Q. You first examined the sidewalk area? A. That is right.

Q. And what if anything did you find there? A. At the time, I didn't find anything out of the ordinary.

Q. What did you then do? A. I believe I contacted the attorney who had charge of the case and asked him to identify the location.

Q. Now, from this notice that I referred to, which was given you: Was that a notice from the firm of Gardiner Wren and Gardiner? A. That is right.

MR. NEWMYER: May we approach the Bench, Your Honor?

THE COURT: Yes.

(Thereupon, counsel approached the Bench and the
133 following occurred:)

MR. NEWMYER: Your Honor, I don't know what he is getting at, but I don't think the plaintiff should be prejudiced if there is any prejudice by what this attorney she formerly had may have represented to the District.

THE COURT: That was her attorney?

MR. NEWMYER: Yes.

THE COURT: Of course, she is bound by his statement. His admission is the same as her admission.

MR. NEWMYER: Well, this isn't a statement made in Court.

THE COURT: Well, that doesn't make any difference. He was her agent and attorney.

MR. NEWMYER: Well, now, apparently he is going to try to say that because this lawyer said sidewalk that he didn't mean tree space, and I think he ought to produce the lawyer.

MR. QUINTER: I have the letter.

THE COURT: That is the original.

MR. NEWMYER: I am not objecting that that is authentic. I don't understand his purpose for using this letter except perhaps to show that the attorney said that it was in the sidewalk.

THE COURT: Well, he has a perfect right to do so.

MR. NEWMYER: One other matter, Your Honor: I notice that the complaint ad damnum (sic) is for \$10,000 and there was no pretrial held. I would like to ask leave
134 to amend to increase the ad damnum (sic) in view of the evidence, which I think shows a verdict in excess of that amount would be reasonable, that is, with the present day situation and it has been three years since the complaint was filed.

MR. QUINTER: Of course, Your Honor, I am going to object. We have given him one amendment to this complaint already, and he has had an opportunity to study—

THE COURT: I don't think it makes much difference how much you claim or how much you want.

MR. NEWMYER: I would like \$20,000.

THE COURT: All right, but don't state that to the jury.

MR. NEWMYER: Thank you, Your Honor.

(Thereupon, counsel resumed their places in the courtroom and the following occurred:)

BY MR. QUINTER:

Q. Mr. Avallone, I show you a letter dated October 30, 1950, with the heading there, "Gardiner Wren and Gardiner," addressed to the Board of Commissioners, District of Columbia, and ask you if that is the notice that you were referring to that you went out and made this examination as a result of? A. Yes.

MR. NEWMYER: He only showed you one letter.

THE WITNESS: Yes, well, I looked at one.

MR. QUINTER: Will you mark this, please?

135 THE CLERK: Defendant's Exhibit No. 2 for identification.

(Thereupon, the letter dated October 30, 1950, was marked Defendant's Exhibit No. 2 for identification.)

MR. QUINTER: May I offer this letter in evidence?

THE COURT: It will be admitted.

I take it you object to it and I overrule the objection.

(Letter previously marked Defendant's Exhibit No. 2 was received in evidence)

MR. NEWMYER: Yes, Your Honor.

MR. QUINTER: May I read it to the jury, Your Honor?

THE COURT: Yes.

MR. QUINTER: Ladies and gentlemen of the jury, this letter is dated October 31, 1950, addressed to the Board of Commissioners of the District of Columbia, District Building, Washington, D. C. It reads:

"Gentlemen"—

MR. NEWMYER: I think he should explain this is from the attorney which Miss Randle originally had at that time.

THE COURT: It is stipulated that he was her lawyer at that time in reference to this matter. Very well.

MR. QUINTER: It is under the firm name of Gardiner Wren and Gardiner. It reads:

"Gentlemen:

"Notice is hereby given under Title 12-208, D. C. Code, 1940, of an injury sustained on the 24th of August, 1950, by Aileen B. Randle, on the southeast corner of 8th and Independence Avenue, Southwest, at about 1:00 p. m.

136 "Miss Randle sustained a broken ankle as a result of tripping over a small segment of a sign standard

left protruding in the sidewalk when the sign was apparently removed.

"This office shall be glad to discuss the matter with any official whom you might designate and to exhibit pictures of the offending obstacle.

"Very truly yours,

"Gardiner Wren and Gardiner," and signed by Edgar A. Wren, Attorney.

BY MR. QUINTER:

Q. Now, you say that as a result of that letter you went down and examined the sidewalk and you found nothing in the sidewalk? A. That is correct.

Q. No imperfection in the sidewalk?

MR. NEWMYER: If Your Honor please, I think we ought to find out just how we are going to use this term, "sidewalk."

THE COURT: Well, I think this was the language of that letter. At present he may use it. You may cross examine the witness later and have him tell you what he means by sidewalk.

BY MR. QUINTER:

Q. So as a result of finding no imperfection in the sidewalk at the area given in the letter, the southwest corner of 8th and Independence Avenue, Southeast, you then
137 got in touch with Mr. Wren? A. Yes, sir.

Q. What did Mr. Wren then advise you? A. He described the location as being in the tree space and that an iron metal was protruding above the surface of the tree space, and of course I went out there.

Q. This was subsequent to that conversation on another date? A. That is right.

Q. Do you recall about when that was? A. The original time I went out, November 16, 1950. The next time I believe was November 22, 1950, if I recall correctly.

Q. At that time did you examine the tree space located at the southwest corner of 8th and Independence Avenue? A. The second time I located the object.

Q. And at that time did you take certain pictures? A. I took certain pictures, yes.

Q. Now, did you at the same time take measurements? A. I took measurements at the same time I took the photographs.

Q. Now, what measurements did you take? A. Why, I located this piece of iron in relation to the sidewalk and the curb, the existing curb; also, the depth of it or the height, you may call it, from the surface of the ground in the tree space.

138 Q. And you took the measurements—repeat what you said there. A. And I took the measurements in relation to the curb to the edge of the existing sidewalk, and either the height or the depth—as you may call it—from the surface of the ground and the tree space.

Q. In measuring this stanchion or metal standard or whatever it was in the ground, whatever you might call it, what did you measure it with? A. With a ruler.

Q. And what did you find the measurement of the height of this standard to be, the height of it? A. It was three quarters of an inch high. It protruded above the surface of the ground three quarters of an inch.

Q. And did you take the measurement of the width of it? A. The width of it was three inches in the long area and the T that comes from it was an inch and a half.

Q. And that is the standard type used stanchion? A. That is right, that is the standard type of stanchion.

Q. Do you know of your own knowledge whether such stanchions are used by the federal government at the various government departments here in the District of Columbia as well as the District?

139 MR. NEWMYER: Your Honor—

MR. QUINTER: I asked him of his own knowledge.

THE WITNESS: I noticed them that they would be same—the District has the same stanchion as the federal government has.

BY MR. QUINTER:

Q. I show you this picture, which is designated as plaintiff's Exhibit No. 4-C, and ask you if that fairly depicts the conditions as you found them when you examined? A. Yes, sir, the same condition.

Q. Is that the same condition? A. Yes, sir, the same condition existed when I found it as is shown on this photograph.

MR. QUINTER: I have no further questions.

CROSS EXAMINATION

BY MR. NEWMYER:

Q. Just one question, Mr. Avallone: In the District the space between the curb and what is known as public parking is known as sidewalk; is that correct? A. Yes.

Q. And tree space can be in sidewalk space; is that right? A. Can I explain that?

Q. That is what I am asking you to do. See if you can answer my question first: Tree space can be in what
140 is known technically as sidewalk space? A. Yes.

Q. Can it also be in parking space? A. No.

Q. You mean you have no trees in parking? A. No, parking space is different than the sidewalk space.

Q. That isn't my question. I know it is different. The second question was: Trees can also be in what is known as parking space, public parking space? A. Yes, sir, trees can be in there.

Q. And "parking" is the technical name for the space between the sidewalk and the building line? A. That is correct.

Q. Right? A. Right.

Q. So you have the building line area known as parking and an area known as sidewalk; is that right? A. Yes.

Q. Now, tree space can be in any one of those? A. They designate tree space—

Q. Answer that question "Yes" or "No," and then you can go on. Read the question.

(Thereupon, the pending question was read by the reporter.)

THE WITNESS: No, not any one of those. You
141 are referring to the parking—no.

BY MR. NEWMYER:

Q. You mean that you can't have a tree in parking space?

A. That doesn't mean that the tree space we designate while I was in the highway department was that space between the curb and the front of the sidewalk.

Q. Yes, but you are talking about the concrete part of the sidewalk. The sidewalk area contains what is known as as tree space, frequently, doesn't it? A. That is right.

Q. So what this attorney might have meant or what this attorney actually said was that this sign standard was left in the sidewalk. That could easily have been understood as sidewalk area, couldn't it? A. No, I wouldn't take that as sidewalk area. I took it as being in the sidewalk itself where the paved sidewalk would be.

Q. Well, you mean you took it as being in the concrete?

A. Yes, sir, the concrete sidewalk.

But nevertheless this tree space was in sidewalk area, wasn't it?

THE COURT: What do you mean by it? It was included within the certain area?

BY MR. NEWMYER:

Q. It was included within the sidewalk area; is
142 that right? A. Yes.

THE COURT: Now, does that mean it was a part of the sidewalk?

THE WITNESS: It is included in the highway department, if I may explain to Your Honor. In the highway department they designate the streets—that part from the curb to the back of the walk as sidewalk area, but they also designate a certain space between the curb and the sidewalk. Like in this particular instance on Independence Avenue we have nine feet of tree space with six feet of walk,

where on the 8th Street side we have four feet of walk. But you have this particular tree way—where we call it tree well is actually what it was.

BY MR. NEWMYER:

Q. You don't know whether this attorney knew about using the technical term "tree space"? A. No, I couldn't say.

MR. NEWMYER: That is all.

MR. QUINTER: That is all I have. I have no further witnesses, Your Honor.

THE COURT: You may be excused then.

(Thereupon, the witness was excused and retired from the witness stand.)

* * * * *

143 MR. QUINTER: I want to renew by motion at this time.

THE COURT: Denied. Will counsel approach the Bench.

(Thereupon, counsel approached the Bench and the following occurred:)

THE COURT: Let me see your instructions.

MR. QUINTER: I want to point out this to you here, that the defendant placed the metal base—they had "placed" in there—and failed to remove, whereas the testimony—you read the two together—the testimony that we placed it in.

THE COURT: I overrule the motion. You don't lose anything by that, the jury passing on it.

* * * * *

149 MR. NEWMYER: Do I understand, Mr. Quinter, you don't object to any of these as the Court has said he is going to give?

MR. QUINTER: No. He is going to charge substantially what I want.

* * * * *

182

CHARGE TO THE JURY

THE COURT: Members of the jury, the plaintiff, Aileen B. Randle, has brought this suit against the District of Columbia seeking to recover compensation for injuries which she claims was caused by the negligent act, or failing to act on the part of the District of Columbia or its agents or employees.

183 The basis of this action is negligence. Negligence is the failure to act in such a manner, such a careful manner, as would ordinarily be exercised by a reasonably prudent person. And if an injury is caused to one person by the negligence or conduct of another, ordinarily the injured person is entitled to recover compensation.

Now, in this case the plaintiff claims that in crossing the highway of the District of Columbia as she went upon the curb along the sidewalk she stepped into a tree space, which is embraced within the concrete portion of the sidewalk, and stumbled upon a metal or other object which was situated within that tree space. And by reason of that, she fell and sustained certain injuries which have been detailed to you.

Now, it is obligatory upon the District of Columbia to exercise reasonable care in the manner in which it takes care of the sidewalks in the District of Columbia, and also of tree spaces upon which pedestrians are likely to walk, and to take reasonable care to insure the safety of the sidewalks and the tree spaces.

The District of Columbia is not an insurer of the safety of pedestrians, but it is under an obligation to use reasonable care for their safety.

If there is an obstruction on the sidewalk or tree space in the District of Columbia and the District of Columbia has actual notice that that situation exists and fails
184 to take due steps to remedy that situation, then it is liable to those who may be injured by reason of that defect.

If it does not have actual knowledge of it and if that condition exists for such a time as the District authorities would have known of it had they exercised reasonable care, then the District is liable to the same extent as if it had actual knowledge of it. In other words, if that condition exists and the District of Columbia, exercising reasonable care for the safety of pedestrians, fails to observe it then you may infer from that that it would have observed it had it taken reasonable care, and it would be liable.

Now, there is no presumption of negligence on the part of the District. It is incumbent upon the plaintiff claiming negligence to show that by the greater weight of the evidence. It is incumbent upon the plaintiff to show negligence. It is incumbent upon the plaintiff to show, first, that she stumbled upon some object situated within this tree space; next, that that condition in that tree space either was known to the District of Columbia, or, if not actually known, that it had continued for such length of time that the District would know it if it exercised reasonable care; and, third, that she sustained certain injuries from any fall which she received.

Now, you are the exclusive judges of the facts in
 185 this case. You are exclusive judges of the credibility of the witnesses who testified before you. And in determining the credibility that you should give to a witness, you should consider first the manner of the witnesses testifying, whether a witness is frank or evasive in answering, the interest that a witness may have in the result of this case whether by reason of being a party or by reason of friendship, employment, or any other fact which in your minds might tend to bias or color the testimony of a witness. I do not mean by that that you must disregard the testimony of a witness because that witness is interested in the result, but you should take that into consideration in weighing the testimony of that witness.

Now, if you find that the plaintiff has shown by the greater weight of the testimony that she fell by reason of stumbling upon some object in this tree space, and if you further find that she has shown by the weight of the testimony either that this obstacle was known to the District of Columbia or would have been known to the District had it existed for such length of time from which you would infer that the District would have known of it, had it exercised reasonable care, and that the situation existed by reason of the negligent failure on the part of the District of Columbia to remove it, then the plaintiff is entitled to recover, unless you find this:

Was the plaintiff, herself, reasonable (sic) careful in the manner in which she was walking, taking into consideration whether or not she was in such a hurry as not to properly look out for what she was doing, and whether or not she exercised due care in walking upon this tree space without further observation, as she was not walking upon the concrete; and, if she was and if she did not exercise that degree of care ordinarily exercised by a prudent person in that situation, and by reason of her failure to do so this accident, of if that contributed to this accident, then she cannot recover even though you find that the District of Columbia was negligent.

Now, as to this question of her negligence: The burden of proof is upon the District to show that and not upon the plaintiff. As there is no presumption on the part of the District of Columbia, so there is no presumption of negligence on the part of the plaintiff.

If you find, therefore, that the District of Columbia was not negligent, or if you find that the accident was due solely to the negligence of the plaintiff herself, or if you find that her negligence contributed to the accident, then she cannot recover and your verdict should be for the defendant.

But on the other hand, as I said, if the plaintiff has shown by the greater weight of the evidence that this obstruction

existed; that she fell over it and certain injuries resulted;
 and that the District of Columbia negligently failed
 187 to exercise that degree of care obligatory upon it in
 the care of this tree space, your verdict should be for
 the plaintiff.

Now, as to this tree space, you may consider this also:
 As to the carelessness or obligation upon the District of
 Columbia upon the care of this tree space upon which pede-
 strians ordinarily do not walk upon as upon the concrete
 portion of the sidewalk universally used by pedestrians, and
 also as to the negligence of the plaintiff herself, the degree
 of care incumbent upon her in walking upon a tree space
 not ordinarily used by pedestrians as compared with what
 might have been due care on her part had she been walking
 upon the concrete portion.

If you find for the plaintiff, then you should return a
 verdict in her favor in such sum of money as would reason-
 ably, fairly, and adequately compensate her for the in-
 juries she may have suffered or has suffered by reason of
 this accident, for her mental and physical suffering, medical
 expenses, loss of salary. And if you find that any of these
 elements are likely to continue in the future, take that into
 consideration in fixing the amount of her recovery.

Now, the plaintiff's counsel has claimed the sum of
 \$15,000. Now, that is not what is to govern you if you
 should return a verdict for the plaintiff, for that amount is
 for you to fix and not for plaintiff or her counsel.

It is equally obligatory upon the plaintiff to show
 188 by the greater weight of the evidence what her in-
 juries were and what compensation she is entitled to,
 as well as to show the liability of the defendant.

Does counsel have any objections? Step to the Bench
 and I will hear them.

(Thereupon, counsel approached the Bench and the fol-
 lowing occurred:)

MR. QUINTER: I have no objection to Your Honor's
 charge. The only thing is I thought you might instruct on

—if you think it might be anything in this case—is the number of witnesses on one side with respect to the number of witnesses on the other.

THE COURT: Well, there haven't been many to testify on any particular fact. Do you have any objection?

MR. NEWMYER: No, Your Honor.

(Thereupon, counsel resumed their places in the courtroom and the following occurred:)

THE COURT: Counsel has called my attention to this, that I neglected to instruct you as to what is the burden of proof, that is, the greater weight which you give to the evidence on one side as to certain facts, as to the other. It is not to be tested simply by the number of witnesses on one side and the number on the other, the question which the whole weight of the testimony has upon your minds.

I will ask you now to withdraw and consider your
189 verdict. Select one of your members as the foreman,
or woman as the case may be, and when you have
agreed upon your verdict then notify the marshal at the
door.

(Thereupon at 11:25 a. m. the jury retired to consider its verdict.)

(Thereupon, counsel was called to the Court's chambers and the following occurred:)

THE COURT: I have a note from the jury, as follows:

“Your Honor, the jury wishes to see Plaintiff's Exhibits 2-A, 2-B, 2-C, and 2-D, and 4-A, 4-B, 4-C, and 4-D; also, the original attorney's letter to the District notifying the District of Columbia of the accident.”

I see no reason why they shouldn't have all that they want.

MR. QUINTER: I have no objection to sending the whole works in if they want to see them. Send all the exhibits if they want them.

MR. NEWMYER: I have no objection to the pictures. I am a little concerned about the lawyer's letter.

THE COURT: I think they are entitled to that. That was in evidence.

MR. NEWMYER: Well, I have no objection to letting them see all the exhibits.

MR. QUINTER: Sent them all in. That will save another note anyway.

* * * * *

191 THE COURT: I have another note from the jury as follows:

"The jury wishes a re-definition of constructive notice apropos of negligence."

Bring them in again.

(Thereupon, the jury returned to the courtroom and the following occurred:)

FURTHER CHARGE TO THE JURY

THE COURT: I have a letter from the jury stating that the jury wishes a re-definition of constructive notice apropos of negligence.

Now, in this case if there was a defect in that tree space and the District knew of it at the time, that would be actual notice.

If it did not, however, but if that continued for such a length of time that the employees or agents of the District of Columbia whose duty it was to make inspection, periodic inspections of the highways of the District, did not notice it, and that lack of notice continued for such a time that you would find that had the District exercised due care, ordinary care, in the inspection of its highways, and in taking care of its highways, this tree space, that it would have noticed it, then that is constructive notice and would have the same effect in this case as actual notice.

THE COURT: Does counsel have any objection to that statement?

192 MR. QUINTER: No objection.

MR. NEWMYER: No objection, Your Honor, if the jury is satisfied.

THE COURT: I will ask you to withdraw and try again and see what you can do.

(Thereupon, the jury again retired to further consider its verdict.)

(Thereupon, at 2:50 p. m. the jury announced its verdict as follows:)

VERDICT

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: The jury has agreed upon a verdict.

THE CLERK: Do you find for the plaintiff or for the defendant?

THE FOREMAN: We find for the plaintiff.

THE CLERK: In what amount, please?

THE FOREMAN: In the amount of \$5,000.00.

THE CLERK: Member (sic) of the jury, your foreman says your verdict is for the plaintiff in the sum of \$5,000, and that is your verdict so say you each and all?

(Affirmative answer in unison.)

* * * * *

No. 12,081

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA, *Appellant*,

VS.

AILEEN B. RANDLE, *Appellee*.

**Appeal from the United States District Court
for the District of Columbia**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED SEP 9 1954

Joseph W. Stewart
CLERK

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NEWMYER & BRESS

STATEMENT OF QUESTIONS PRESENTED

In the Opinion of the Appellee, the Questions are:

1. Was it a clear abuse of discretion for the Trial Court to refuse to except from the Rule against witnesses an Assistant Claims Inspector of the District of Columbia when the defendant * offered the Court no reason for the necessity of his presence in the courtroom, no explanation of his subsequent testimony, nor any showing on which the Trial Court could determine that his absence would prejudice the defendant?

2. Did the Trial Court properly deny defendant's motion for directed verdict when the testimony of three witnesses, including a supervisory employee of the defendant, proved beyond question that defendant created the dangerous obstruction which caused plaintiff's injury, and the testimony of two witnesses, including the same employee of the defendant, proved that defendant had ample time to observe and remedy the defect prior to plaintiff's injury?

3. Did the Trial Court properly deny defendant's motion for directed verdict based on the alleged insufficiency of the complaint, when the complaint alleged (and the evidence showed) that defendant was negligent in failing to maintain a tree space in a reasonably safe condition, and also in failing to remedy a dangerous condition, of which it had both actual and constructive notice.

* The parties will hereafter be referred to as they appeared in the court below, i.e. "plaintiff" (appellee) and "defendant" (appellant).

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,081

DISTRICT OF COLUMBIA, *Appellant*,

vs.

AILEEN B. RANDLE, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Plaintiff testified that about 1:00 P. M. on August 24, 1950, she was on her way from her Government office to lunch (App. 10**), accompanied by another lady (Mrs. Jessie Sudermann) who was walking to her right (App. 11), and that they were walking in an easterly direction in the crosswalk approaching the southeast corner of 8th

** Reference to the joint appendix will be made as follows
“(App. —)”.

and Independence Ave., S. W. (App. 13). At that corner, there is a large tree surrounded by a bed or dirt space which is approximately in the middle of the sidewalk area as one approaches the corner from the crosswalk (Plaintiff's Ex. 1), and which leaves only a couple of feet of concrete sidewalk to the north of the tree at that corner (App. 11). At that time, there were two men standing in the limited sidewalk space to the left of the tree as they approached it and, therefore, the two ladies, in order not to disturb the two men, walked around to the right of the tree to continue their travel (App. 11, 13). Mrs. Sudermann, the lady on the plaintiff's right, stepped from the curb onto the sidewalk, but did not leave plaintiff sufficient room to step up on the concrete, and the plaintiff, therefore, stepped into the dirt space. Just as plaintiff reached the curb with her right foot and lifted her left foot up and set it down in the dirt space, her foot stepped upon a metal standard sticking out of the ground, which caused her ankle to "buckle over" and throw her to the ground (App. 11). The plaintiff testified that the metal "stob" which she stepped upon, as she observed it after her fall, was "about two or three inches high" (App. 13). The plaintiff testified that the photographs taken by the defendant three months after the accident (Plaintiff's Exs. 2A, B, C, D) showed the correct position of the metal stob in relation to the curb, but did not show the actual height of the stob above the ground, as it appeared to her on the day of the accident (App. 15). She next identified other photographs, later admitted in evidence as plaintiff's Exhibits 4A, B, C, and D. (App. 26), which she stated were taken by a friend three weeks after the accident (App. 21), and which accurately portrayed the appearance of the metal stob as it looked on the day of the accident (App. 15). She stated, however, that on the day of the accident, there was grass growing on the west side of the stob (next to the curb) which obscured

the stob from her view as she stepped upon it from the curb (App. 16, 21). Plaintiff further testified that the metal stob on which she fell was the same shape as the standard holding the stop sign a few feet from it (App. 17), and it was the same hollow "horse-shoe" shape as the standards on all the other "Do Not Enter", "Stop" signs and other public signs that she has observed throughout the city (App. 21).

The next witness for the plaintiff was Carlo Maggi, a professional photographer, who stated that although he did not recall the month, he accompanied the plaintiff in 1950 to the situs of the accident and took some photographs (App. 22-23). (The plaintiff testified that this was approximately three weeks after the accident (App. 21) Mr. Maggi identified his photographs and they were admitted as Plaintiff's 4A, B, C, and D. Mr. Maggi said that these pictures accurately reflected the condition that he observed at the time he took the photographs (App. 23).

The next witness was Sgt. Cortizas, a specialist in plastic surgery at Walter Reed Hospital, and he testified that on the day of the accident he was walking about 15 feet behind the plaintiff and her friend, and he saw plaintiff fall in the tree space (App. 27-28). He said that she fell on an iron object which was "exposed in the ground", and that it was exposed about 2½ or 3 inches. He then said that "eventually the rain was washing the ground leaving it exposed" (App. 28). Sgt. Cortizas further stated, on cross examination, that he could not have been mistaken in the height which the metal stob projected from the ground, and that it was not three-quarters of an inch as suggested by defendant's counsel (App. 29-30). He said that he was an artist and that his observation was very important to his profession (App. 30). He further stated

that he had passed by this particular corner almost every day for the past five years, and although he did not recall particularly noticing the metal stob prior to the accident, in answer to defendant's counsel's specific question, he replied, "Yes, it appeared dangerous, worse than that—right now you go over there, there is about three inches exposed right there now, more than that. The ground is washed" (App. 32).

The next witness, Jessie Brook Sudermann, testified that she was accompanying the plaintiff, Miss Randle, on the day of the accident, and that she observed the two gentlemen blocking their pathway on the sidewalk on the day of the accident, and they therefore walked around the tree to the right, and that after the plaintiff's fall she saw the stob sticking up that Miss Randle fell over, where "someone had sawed off a standard" (App. 34), and that the top of the stob was on the level of the adjoining concrete sidewalk (App. 35). She further testified that she sent the District Government a statement shortly after the accident in which she had stated that Miss Randle had "stepped on a metal sawed-off standard staff" (Plaintiff's Ex. 5, App. 38).

The next witness introduced by the plaintiff was Mr. Joseph Parlon, an employee of the District Government's Highway Department for 29 years, who stated that he was head of the Sign Department which handles the placing of street signs (App. 39). Upon being shown plaintiff's Exhibit 4D, showing the metal stob over which plaintiff fell, he said "That looks like the same type of pole that we use", and that it is used for "Stop" signs and "No Parking" signs, and that the metal stob shown in the photograph was part of an 11' 6" pole "which has been sawed off" (App. 39). He further said that when his department moves these poles, "if possible, we try to eliminate them by taking them out of the ground; if not, we

generally saw them off and drive them into the ground" (App. 39).

The following then occurred:

"Q. And if for any reason over a period of time the ground level sinks, that would mean more of the pole would be exposed; is that right:

A. That would be possible, yes sir.

Q. It would take a considerable time, wouldn't it?

A. Yes, Sir."

Mr. Parlon also testified that his Department had a record of placing a "Stop" sign on the southeast corner of 8th and Independence Avenue, S. W. on October 2, 1942 (approximately 8 years before the accident) and that his records did not show any change in the location of the sign (App. 40); however, he stated that there are approximately 72,500 such signs in the District of Columbia, and that he was not willing to say that there was an accurate record of the exact location, or of the movement of each sign they had placed, and that they had been spot checking their signs only since 1950 (App. 41). Mr. Parlon next stated that he did not guarantee that the records were accurate on the location of signs placed prior to 1950 (App. 41-42).

The next witness for the plaintiff was Mr. Benjamin P. Blaine, an employee of the National Capital Parks, who stated that the U. S. Government had no control, and never had, over the corner on which this accident occurred, and that he would have no occasion for installing signs there (App. 42). He further said that "we put our signs up through the park areas. The District puts them up all through the other streets. Now, this one particular location would come under District Government" (App. 43).

Only one witness was presented for the defendant, Mr. Oscar Avallone, who testified that he was employed by the

Corporation Counsel's Office in the Office of the Inspector of Claims, and that on November 16, 1950, as a result of a letter from plaintiff's former attorney, he visited the scene of the accident and could not locate the metal stob (App. 50), but that he subsequently went out on November 22, 1950 and located it, and took photographs. His measurements taken that date, three months following the accident, showed that the metal stob protruded three-quarters of an inch above the surface of the ground (App. 51), and the stob was "the standard type used stanchion" (App. 5). He further said that the Federal Government used the same type of stanchion (App. 51). Upon being shown plaintiff's Exhibit 4C (the photograph taken by Mr. Maggi three weeks following the accident) by defendant's attorney, the witness stated that "the same condition existed when I found it as is shown on this photograph" (App. 52). Mr. Avallone further testified that the tree space was in the "sidewalk area" (App. 52).

The Trial Court denied defendant's Motion for Directed Verdict (App. 54), and defendant did not object to the Court's charge (App. 58, 60). The jury returned a verdict for plaintiff of Five Thousand (\$5,000) Dollars (App. 60-61) from which verdict, this appeal is taken by the defendant.

SUMMARY OF ARGUMENT

The exclusion of the presence from the courtroom of a subordinate employee of the District on the ground that he was to be a witness in the trial was within the sound discretion of the Trial Court. Such exclusion was not the exclusion of a party, since the District, the municipal corporation, was the defendant. Further, there were no reasons offered at trial, nor are any presented here to show why this employee should have been exempted from the

rule against witnesses. In any event, there has been no showing that the exclusion of this witness was in any way prejudicial to the presentation of defendant's case. The authorities cited by defendant deal with the exclusion of testimony rather than the witness' presence.

There was substantial evidence to show that the defendant, in accordance with its practice of sign removal, created a condition which was inherently dangerous, and hence had actual notice of its existence. Notwithstanding actual notice, the defendant had ample opportunity to discover and repair the protruding, sawed-off, metal stanchion in a tree space in a frequently used section of the city. The protrusion became gradually higher as a result of the erosion of the surrounding area, and, since this erosion occurred over a considerable period of time, there was substantial evidence from which constructive notice could be imputed to the defendant.

The amended complaint was sufficient in that there were two allegations of negligence (1) that the defendant failed to maintain the tree space in a reasonably safe condition, and (2) that defendant failed to remove therefrom a metal base which it had placed therein. Both allegations were proven by substantial evidence.

ARGUMENT

I

The Exclusion of Witness Avallone's Presence from the Courtroom Was a Proper Exercise of Judicial Discretion.

After the jury was impanelled, the attorney for defendant asked the Court whether a gentleman seated at the counsel table with the two defense attorneys, Mr. Quinter and Mr. Ward, could remain there. The Court inquired whether he was an attorney in the case and was advised that he was not, but was an assistant claims in-

spector for the District of Columbia. Thereupon the Court said he could not sit at the counsel table (App. 8).

After further discussion at the bench, during which defendant's counsel informed the Court that this gentleman, Mr. Avallone, was to be a witness in the case, the Court said that, although it agreed that a representative of the District of Columbia could be present, Mr. Avallone should not be exempted from the rule against witnesses merely because he was an employee and representative of the District of Columbia, and that the Court was not excluding him as the District's representative, but "as a witness" (App. 9). Neither during this discussion, nor subsequently, did defendant's counsel advise the Court what knowledge Mr. Avallone had of the case, what his testimony would be, nor the necessity for his presence at the counsel table, and gave the Court no basis on which to determine that his exemption from the rule was desirable or necessary (App. 8-9).

That sequestration of witnesses is within the discretion of the trial court is well settled. The history of separating witnesses "in order to detect falsehood by exposing inconsistencies" is traced to ancient times. . . . The practice, of course, crossed the water with the common law . . ." Vol. 6, Wigmore on Evidence, 3rd Ed. Section 1837, page 347.¹

It is also fundamental that the trial court's discretion in the separation of witnesses (putting witnesses under the rule) should not be reviewed unless a clear abuse of

¹ Wigmore traces the sequestration of witnesses to the story of Daniel's judgment in the history of Susanna as related to apocryphal Scriptures where the wife of Joacim was convicted and sentenced to death for adultery. Before the execution, Daniel intervened and insisted upon examination of the two accusing witnesses separate and apart from each other, and as a result of such examination discrepancies were disclosed resulting in an acquittal.

discretion is shown. 53 Am. Jur. Sec. 31-33; Wigmore on Evidence, 2nd Ed. Vol. 3, Sec. 1839 pgs. 9-11; Jones Commentaries on Evidence, Trial Ed. Vol. 6, pgs. 4941-4942, Secs. 2497-2498; *Coonan v. Baltimore & O. R. Co.*, 25 Fed. Supp. 834; *Holder v. U. S.* 150 U.S. 91, 14 S. Ct. 10, 37 L. Ed. 1010; *Hood v. U. S.* 23 Fed. (2d) 472; *Mitchell v. U. S.* 126 Fed. (2d) 550 certiorari denied, 316 U. S. 702, 62 S. Ct. 1307, 86 L. Ed. 1771.

In *Kaufman v. U. S.*, 163 Fed. (2d) 404, 408, the Court said:

"Sequestration of witnesses in the federal courts is discretionary with the trial court, and its ruling will not be disturbed in the absence of manifest prejudice."

And in *Oliver v. U. S.*, 121 Fed. (2d) 245, the court held that in the absence of an affirmative showing of an abuse of discretion or manifest prejudice, the exclusion of a witness from the courtroom while not testifying is addressed to the Trial Court's sound discretion.

None of the cases cited by defendant in support of its claim that the Trial Judge abused his discretion, is in point. We do not deny that in an ordinary case a party to the action has a right to be present during the trial, but this rule has not been extended to any subordinate employee of a corporation, especially to one who intends to be a witness in the case. The only cases cited by defendant involving corporations are *D. C. v. Flagg*, *infra*, and *Lenoir Car Co. v. Smith*, *infra*.

The case of *District of Columbia v. Flagg*, 42 App. D. C. 73, on which defendant places great reliance, is the same case which the Trial Judge (Judge Bailey) read at defendant's request before making his ruling that Mr. Avallone should not be excepted from the rule against witnesses. Judge Bailey said: "Mr. Quinter, I think you

were right on the view that the representative of the District could be present, but not as a witness" (App. 9). The learned Trial Judge obviously noted the principal distinction between the *Flagg* case and the one at bar, which was that the *Flagg* case held that it was erroneous to have excluded a witness' testimony, even though he had disregarded the rule against witnesses and remained in the courtroom. It does not necessarily follow, however, that if that trial court had excluded the witness, and allowed his testimony, that such would be reversible error.

The case of *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S.W. 879, also cited by defendant is subject to the same distinction. There again the testimony of the witness was excluded, not merely his presence in the courtroom. It is noted, in the quotation given by defendant from that case, that an *officer* of the corporation was involved, not merely a subordinate employee, as in the case at bar. Further, in that case, an affidavit was presented to the trial court setting forth the nature of the witness' testimony, which at least gave the trial court therein an opportunity to determine the necessity for making an exception to the rule. That was not done here, *nor has any reason yet been given by defendant as to why Mr. Avalone's presence in court was necessary to the proper presentation of its case.*

The case of *Hughes v. State*, 126 Tenn. 40, 148 S.W. 543, cited by defendant, was one where a detective was permitted to testify in rebuttal, notwithstanding that he had sat at the counsel table during a criminal trial. The court held only that this was not an abuse of discretion, and that rebuttal witnesses do not go under the rule. On the other hand, in the case of *Berberet v. Electric Park Amusement Co.*, 319 Mo. 275, 38 S.W. (2d) 1025, the Court held that even the exclusion of one of the defend-

ant's attorneys, who intended to be a witness in the case, was neither an abuse of discretion or reversible error.

That the exclusion of Mr. Avallone was not the exclusion of a party is shown in the leading and clearly dispositive case, decided in the Second Circuit, of *U. S. v. 5 Cases, More or Less, Containing Figlia Mia Brand*, 179 Fed. (2d) 519, where a corporation, the claimant, asked that witnesses be excluded from the courtroom and the court invoked the rule and excluded the corporation president. In deciding that such exclusion was not the exclusion of a party, nor reversible error, the court said at pg. 522:

"Nor was there error in excluding the appellant's president from the court room. The appellant had requested that witnesses be excluded. The Judge granted that request but, in effect, annexed to the grant the condition that Mr. Corrao, who was also to be a witness, should likewise be excluded. *This was not, as appellant contended, the exclusion of a party; the corporation, not Mr. Corrao was the claimant . . .* As the matter is clearly procedural, we shall follow the rule of universal application in federal courts that the exclusion of witnesses from the court room lies within the discretion of the trial judge . . . There was no abuse of discretion in attaching to the granting of appellant's motion to exclude witnesses the condition that the witness Corrao should also be excluded." (Emphasis supplied)

Even assuming that Mr. Avallone could be considered an officer of the Municipal Corporation, which he is not, as indicated above, no prejudice whatever has been shown by the defendant as a result of his exclusion by the Trial Court. Defendant merely cites the *Flagg* case, *supra*, and assumes, ipso facto, that the Trial Court below committed reversible error. This is not a proper interpretation of any of the decided cases.

In conclusion, we should like to add that a review of Mr. Avallone's testimony showed that he had little knowledge of the case, and merely visited the scene of the accident several months later to take measurements and photographs (App. 46-54). Not knowing anything of the nature of his subsequent testimony, and not being so advised by defendant's counsel, it was obviously thought by the Trial Court and plaintiff's counsel when the question of his presence was first raised, that he might be used as an impeaching witness, or that he had actual knowledge of the accident and should therefore properly go under the rule. In any event, however, since his testimony was of so little significance, it is not possible to understand how his exclusion from the courtroom in any manner prejudiced the defendant. It is common knowledge that there were numerous other assistants in the Corporation Counsel's office who could have assisted at the trial or who easily could have obtained Mr. Avallone's limited knowledge of the case.

II

Defendant Had Notice of the Dangerous Condition of the Street.

Defendant must not believe too strongly in the point raised in the second section of its brief since it contents itself with an academic recitation of the general law of notice in the case of municipalities, and concludes with two bare statements that witness Cortizas had never observed the stanchion prior to plaintiff's fall, and that witness Parlon indicated that the District had never placed a sign at the location of the fall. Both statements are as misleading as they are erroneous.

Sgt. Cortizas stated that he had passed this corner many times on his way to lunch and that he had observed "the wash in the ground" (the tree box) and that he was

familiar with all the trees since he supervised a neighborhood children's club whose members go around and pick up broken glass, etc. in the neighborhood (App. 31). As to seeing the stanchion previous to the accident, his testimony was as follows (App. 32):

"Q. In five years you never saw the stanchion sticking up there, did you?

A. Probably seen it, but not that I recall well.

* * * *

Q. But in all those times that you saw it (the tree box) you never yourself observed this stanchion?

A. No, Sir.

Q. Never saw it:

A. I can't swear to that. There are many things—
(Witness interrupted)

* * * *

Q. You just don't remember having seen that thing before this accident, do you?

A. No."

From this line of questioning, it is apparent that the witness was attempting to indicate that he had probably seen the stanchion, but didn't take particular notice of it prior to plaintiff's accident, and he was not willing to say that he had never seen it, as defendant's counsel tried to press him into saying. On the basis of this, defendant suggests the untenable proposition that since a casual passerby could not positively state that he had previously observed the particular stanchion over which plaintiff fell, the District, whose duties to the public require it to inspect for and locate dangerous obstructions, could not have had notice of its existence. This question of whether the District knew of the existence of the stanchion, notwithstanding the fact that Witness Cortizas could not positively state that he had previously seen it, was properly one for the determination of the jury, (See *D. C. v. Boswell*, 6 App. D. C. 402, 418-419) and other testimony

from this and other witnesses (See III, *infra*) showed that the District not only created the condition but had a "considerable time" (App. 39) to observe it.

The other allegation, that Witness Parlon indicated that no sign had ever been placed by the District "at the location of the alleged fall" is completely misleading. Mr. Parlon said that his records showed that a stop sign had been placed at that corner in 1942, and that his records did not show that it had been "removed from any location at that particular corner" (App. 40), but he went on to say that he could not guarantee that his records were accurate on signs placed before 1950, since his office had control of over 72,500 such signs and they had been spot checking to verify their records only since 1950 (App. 41). Since there was little doubt from the other testimony that the stanchion over which plaintiff fell was part of a standard identical with those used by defendant on all of its stop signs (App. 17, 21, 39), and that it was a standard which had been sawed off as was the customary practice (App. 39), the defendant's inference that its records proved that plaintiff could not have fallen over one of their signs seems unsubstantial, as the jury probably concluded.

It should also be noted that the defendant's records, from which Mr. Parlon testified, indicated only the *corner* on which the sign was placed, and not its exact position (App. 40). Thus, the fact that the records showed a stop sign was installed on this particular corner on October 2, 1942, does not necessarily indicate that no other sign was placed at that corner on or after that date; or that the sign now on that corner was the same as that installed in 1942, especially when the records are not accurate.

III

Although, as Defendant Claims, It May Not be Liable in the Absence of Timely Notice of a Defect, Notice Was Inherent in That Defendant Created the Condition Causing the Injury, and Also Had Ample Time, in the Exercise of of Ordinary Care, to Correct Same Prior to Plaintiff's Injury.

A. As to Actual Notice

There was ample evidence on which the jury could base a finding that the District originally installed the metal stanchion, and in accordance with its practice, instead of removing it when it served its purpose, sawed it off and pounded the base into the ground.

That the object was identified as the base of a stanchion used by the defendant was shown from the following testimony:

Plaintiff testified:

"As I recall, it was the same shape as the standard holding the stop sign a few feet from it.

BY MR. NEWMYER:

Q. The same shape. And how about—was the metal also—

A. The same shape, the same metal." (App. 17)

* * * *

BY MR. QUINTER:

"Q. You stated on direct examination, did you not, that it was of the same shape and the same metal as a stop sign a few feet from it?

A. Did I say similar?

Q. The same metal as the stop sign a few feet from it and the same shape. You can say yes or no whether you said that.

A. I think I said that.

Q. I show you this picture, which is Plaintiff's Exhibit No. 2-A and point out a stop sign there to you

and ask you if that is the stop sign to which you refer?

A. I believe so.

Q. That is the one to which you refer.

MR. QUINTER: May I show that to the jury?

THE WITNESS: The hollow shape—

THE COURT: Wait. You have answered the question. (Thereupon, Plaintiff's Exhibit No. 2-A was passed among the jurors) (App. 21).

* * * *

Q. Was it at that time that you reached the conclusion that it was the same shape or the same metal as the stop sign a few feet from it?

A. After observing the horse-shoe shaped stob that I fell on, *I have observed quite a number of "Do Not Enter" and "Stop" signs and all types of signs put up by the city and every one I have observed has that same peculiar shape* (Emphasis added) (App. 21).

Witness Sudermann testified:

"And this was also not paved—I mean no concrete there. It was gravel and stone. And sometime along the line, why someone had sawed off a standard, and there that stob was sticking up there" (App. 34).

* * * *

"CROSS EXAMINATION

BY MR. QUINTER:

Q. Now, you say there was a metal standard sticking up in this place where there was gravel?

A. You see, sir, it had been sawed off and it apparently was on the level of the concrete part where the spot should have been concreted, you understand.

Q. You saw it there, did you?

A. Yes" (App. 35).

Finally, Mr. Joseph Parlon, an employee of the District Department of Highways, testified:

"Q. I just want to ask you one question: I show you a photograph which has been marked Plaintiff's Exhibit No. 4-D and ask you what that metal piece in the ground is?

A. That looks like the same *type of pole that we use.*

Q. The same type of pole that you use?

A. Yes, Sir.

Q. And is that used for stop signs and no parking signs?

A. That is correct, Sir.

Q. And is that a base of a pole, or is that a separate piece that the pole fits in?

A. That there is part of a pole, part of an eleven foot six section.

Q. Which has been sawed off?

A. Which is the way it apparently looks to me, Sir" (App. 39).

Mr. Parlon further testified:

"Q. What is the practice when you move a pole?

A. Well, in moving these poles, if it is possible we try to eliminate them by taking them out of the ground; if not, we generally saw them off and drive them into the ground.

Q. Saw them off and drive them into the ground?

A. Yes" (App. 39).

Additionally, the photographs Plaintiff's Exhibits 4A, B, C, D verified the identity of the stanchion.

It is well established that where a municipality creates a potentially dangerous condition proximately causing an injury, the requirement of notice is not necessary as a condition precedent to liability.

In *Bello v. Cleveland*, 106 Ohio St. 94, 138 N.E. 526, the court said:

"... Terminating the tile drain underneath the bituminous shoulder was bound to result in just such a dangerous condition as did develop and the State having created a proximate cause of the condition and being cognizant of the fact was bound to remedy it." See also *Wilke v. State*, 178 Misc. 763, 36 N.Y.S. (2d) 455.

In *Fackrell v. City of San Diego*, 26 Cal. (2d) 196, 157 P. (2d) 625, 158 A.L.R. 773, the defendant contended that

where a defective condition is not in existence at the time an improvement is completed, but arises subsequently thereto, notice of the defect must be given, and since the erosion did not take place until some months after the completion of the improvement it was not liable. The court, in dismissing this contention, held that if conditions are normally to be anticipated which might render dangerous an improvement not obviously so at the time of its completion, such for example, as the occurrence of heavy rainfalls which might cause erosion, the plan of improvement must be regarded as dangerous and impute notice to the municipality.

The court held in *Jones v. Deering*, 94 Me. 165, 8 Am. Neg. Rep. 434, that notice was not a condition precedent to liability where a city engineer failed to remove a stake set in the ground for surveying purposes, and plaintiff was injured as a result. See also *Hood v. Allen*, 190 Tenn. 56, 227 S.W. (2d) 534, 16 A. L. R. (2d) 1286.

In the case of *Dotey v. D. C.* 25 App. D. C. 232, 236, this Court said:

"Then, as to these water plugs, they are put down by the municipality, and the adjacent owner has no control over them, and no right to interfere in any manner with them, except by permission of the municipal authorities; and whether they are placed in the main sidewalk or in the portion of the sidewalk leading to the house, if they are placed in either, it is the duty of the municipal authorities to see that they *do not become dangerous obstructions* to those having occasion to use the sidewalks" (Emphasis added).

In *Sherwood v. D. C.* 3 Mackey (14 D. C.) 276, 51 Am. Rep. 776, this Court held that the city was bound to know that a wooden platform was liable to decay. See also: *Brennan Construction Co. v. Cumberland*, 29 App. D. C. 554.

In *D. C. v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472, the Supreme Court held that the issuance of a permit by the city was equivalent to notice. There the court said at 34 L. Ed. 477:

"If a permit is granted, as is usually the case, the fact is notice to the authorities that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted."

It is therefore apparent that defendant had actual notice of a condition which was inherently dangerous. Pounding the base into the ground rather than removing it, coupled with a general knowledge of rainfall and erosion, was certainly sufficient to show that this condition was inherently dangerous. An additional factor was the location of this particular tree space relative to the corner, the sidewalk and the area. As shown by the photographs, Plaintiff's Exhibit 1, continued usage by pedestrians would facilitate a sinking and wearing away of the ground at the situs.

B. *As to Constructive Notice*

Regardless of who originally placed the object, there was substantial evidence on plaintiff's case from which the jury could find that the defect existed for a sufficient period of time from which constructive notice might be imputed to the defendant.

The photograph, (Plaintiff's Exhibit 4C) as identified not only on plaintiff's case, but by Mr. Avallone on defendant's case, itself shows clearly that the protrusion did not develop overnight or in a brief time, but that the erosion which took place in the tree box developed over a considerable period of time, causing the stanchion to protrude higher and higher as the earth washed away.

Sgt. Cortizas testified:

"Q. Will you describe it to the jury?

A. An object, an iron object exposed in the ground, and call it a box or what you—the ground box of a tree—and it was I would say about two and a half or three inches exposed from the ground. Eventually the rain was washing the ground leaving it exposed" (App. 28).

* * * *

"Q. It didn't appear dangerous to you?

A. Yes, it appeared dangerous, worse than that—right now you go over there, there is about three inches exposed right there now, more than that. The ground is washed" (App. 32).

And Mr. Parlon of the defendant's Department of Highways testified:

"Q. And if for any reason over a period of time the ground level sinks, that would mean more of the pole would be exposed; is that right?

A. That would be possible, yes, sir.

Q. It would take a considerable time, wouldn't it?

A. Yes, Sir" (App. 39).

The liability of the defendant is to be tested by whether or not the municipality, by the exercise of reasonable care and supervision, could have discovered the defect within a sufficient time before the accident to have remedied it (*District of Columbia v. Wood*, 41 App. D. C. 101; *District of Columbia v. Payne*, 13 App. D. C. 500).

This Court held in *District of Columbia v. Boswell* 6 App. D. C. 402, that the defect need not be so open and palpable as to be apparent to and necessarily attract the attention of passersby. See also *Domer v. District of Columbia*, 21 App. D. C. 284.

In *Potomac Electric Power Co. v. Hemler*, 47 App. D. C. 34, this Court held that where the evidence showed that an uncovered gas box was in that condition in one of

the thickly settled portions of the city for more than two weeks before the accident, there was sufficient evidence to warrant the jury in finding that the District had or should have had notice.

In *Doctors Hospital v. Badgley*, 81 U. S. App. D. C. 171, 156 Fed. (2d) 569, this Court held that a jury was entitled to infer that a floor in the hallway of a building through which people pass on a rainy day would become wet as a result of the drippings from those entering from the street and that such deposits accumulated by a gradual process. The court added that the jury might fairly think that if due care had been exercised, the wetting process would have been discovered and that some efforts would have been made to obviate the condition. Reasoning from analogy to the instant case, it is apparent that the District was aware of its own practice of not removing some of its stanchions completely from the ground, and was further cognizant of the ground erosion in tree spaces due to the gradual activities of the elements. Thus, the jury might correctly believe that due care required that some means be used to inspect for and eliminate this condition.

Plaintiff's Exhibit 1, the photographs observed by the jury, clearly reveal the location of the tree space in question, at the corner of 8th and Indiana Avenue, S.W. It was apparent that this was a tree space in a thickly populated section of the city and because of its peculiar location at the corner (App. 11), it was obvious that this particular space was frequently used by pedestrians.

The duty of the District to discover defects in a thickly traversed area was expressed by this court in *Burke v. District of Columbia*, 42 App. 438, 441-442.

"It may be conceded that what would amount to negligence in maintaining a much-traveled street in a populous city might constitute ordinary care in a

country district; in other words, that the question of negligence depends upon the attendant facts and circumstances. The accident in the present case, however, so far as the evidence discloses, occurred upon a macadamized street, 'constituting a main thoroughfare', and in a populous part of the District."

See also *Potomac Electric Power Co. v. Hemler*, supra, and *Schuler v. Mobridge*, 44 S. D. 488, 184 N.W. 281.

For the foregoing reasons, it is apparent that defendant had ample time in which to discover and remove the protruding stanchion base over which plaintiff fell, and notwithstanding actual notice of this potentially dangerous condition, should have located this object long before the elements and ordinary use caused it to protrude two to three inches above the surface of the ground.

C. *As to the Sufficiency of the Complaint*

Defendant makes the same loose argument that was made at trial that there was only one allegation of negligence in the amended complaint. This is incorrect. The amended complaint charged that the defendant was negligent

- (1) "... in failing to maintain said tree space in a reasonably safe condition", and
- (2) "... in failing to remove therefrom the said metal base which it had placed therein and failed to remove after actual or constructive notice thereof. . . ."

Defendant made the same contention at the bench during the trial, that plaintiff had only one allegation of negligence in the amended complaint, whereupon plaintiff's counsel advised him that there was a comma between the two clauses which he completely ignored. The following proceedings took place at the bench (App. 44, 45):

"MR. QUINTER: There is no testimony, there is no evidence to the fact that we did install it. There is likewise no evidence that we removed it or that we cut it or that we did anything to it. The evidence is that this was a stanchion—

THE COURT: The gist of the case is that that metal object was there in that parking place. By "parking" I don't mean parking for cars, but I mean in the sense of parking—it is not covered with concrete.

MR. QUINTER: Well, that may be what the plaintiff intended her case to be, but that isn't what she alleges, Your Honor. That is my point.

THE COURT: It is sufficient to go to the jury.

MR. QUINTER: Well, what I am trying to say Your Honor, is that she alleges something entirely different from that. She says that in failing to remove this said metal base, through its agents—

THE COURT: I think that is the gist of the case under the plaintiff's testimony, the testimony of the plaintiff and witnesses, that there was that obstruction and it was negligently permitted to remain there by the District.

* * * *

"MR. NEWMYER: No, No, and by the way you forgot that there is a comma after the word 'condition'. There are two allegations: Failing to maintain the tree space in safe condition; and then another one, failing to remove the metal stanchion."

The word comma, according to Webster's New International Dictionary, Second Edition, Unabridged, comes from the Latin, meaning "part of a sentence", and from the Greek, "Koma" or clause which comes from the word *Koptein* "to cut off". Comma is further defined: "as a point used in writing and printing to indicate separation of words, phrases or clauses from others not closely connected in the structure of the sentence."

"The comma, . . . is used primarily . . . to set off words, phrases and clauses that are appositional or parenthetical or *independent*. . . ."

Since there was a comma between the two clauses, a reasonable construction of the complaint, as plaintiff's counsel pointed out at the trial, and as the Court understood it, is that there were two allegations of negligence, both of which were, in fact, proved by the evidence.

CONCLUSION

For the foregoing reasons and authorities cited herein, it is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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United States Court of Appeals
For the
District of Columbia Circuit

FILED NOV 24 1954

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph D. Stewart
CLERK

No. 12,081

DISTRICT OF COLUMBIA, *Appellant*,

v.

AILEEN B. RANDLE, *Appellee*.

PETITION FOR REHEARING EN BANC

The District of Columbia, appellant in the above-entitled cause, petitions the Court for a rehearing en banc of said cause, and as grounds therefor states as follows:

On November 3, 1954, the appeal in this case was orally argued before Circuit Judges Wilbur K. Miller, Fahy and Washington. On November 10, 1954, a per curiam opinion, consisting of four sentences and two paragraphs, was filed. In the second paragraph, the conclusion is reached by said Circuit Judges that they have "carefully considered the record and find no error which seems * * * sufficient to require the jury's verdict to be set aside." Counsel for the appellant are firmly convinced that there are several very serious errors disclosed by the record and that such errors are of such great importance that it is imperative that they should be considered by all the members of this Court sitting en banc.

The District of Columbia has been deprived of a fundamental and constitutional right and will, as a result thereof, if the present opinion remains the law of this jurisdiction, be at a great disadvantage in future litigation.

The first point on appeal raised by the appellant in this case was that the trial court erred in excluding from the courtroom during the trial, on the sole ground that he would give testimony in the case and was, therefore, subject to the rule on witnesses, a representative of the District of Columbia Government.

At the outset of the trial, over objection of appellant, the trial court excluded one Oscar J. Avallone, an Assistant Inspector of Claims for the Government of the District of Columbia, who was in court as the District of Columbia's representative (App. 8, 9). Although the lower court was correct in its statement that "the representative of the District could be present" (App. 9), it was incorrect in holding that such representative was subject to the rule excluding witnesses and, therefore, since he was to be a witness, could not be present during the trial (App. 8, 9).

It is fundamental that a party to an action is entitled to be present in the courtroom during the trial of his cause. *Coonan v. Baltimore and O. R. Co.*, (DC) 25 F. Supp. 834, 835; *Georgia R. R. and Banking Co. v. Tice, et al.*, 124 Ga. 459, 52 S. E. 916, 4 Ann. Cas. 200; *Schneider v. Haas*, 14 Or. 174, 12 P. 236, 237, 58 Am. Rep. 296; *Smith v. Collins*, 94 Ala. 394, 10 So. 334; *Pedrow v. Federoff*, 77 Cal. App. 164, 247 P. 212; *Seaboard Airline Ry. v. Scarborough*, 52 Fla. 425, 42 So. 706. As was stated in *Larue v. Russell*, 26 Ind. 386, " * * * The right of a party litigant to be present during the trial of his cause, that he may be heard in his own behalf, has been so long accorded by universal custom, and it is so obviously necessary to the security of private rights, that the

refusal to entertain the cause at all would scarcely be a greater error than the denial of the privileges. * * *

The general rule is stated in 53 Am. Jur., Sec. 24, p. 42 (citing *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853, 39 S. Ct. 435), as follows:

“A party to a civil action who is not in default is entitled to be present in the courtroom, and to be represented by counsel at all stages during the actual trial of the action. * * *

This Court has heretofore adopted that well established rule as the law of this jurisdiction. *District of Columbia v. Flagg*, 42 App. D. C. 73.

In *District of Columbia v. Flagg*, *supra*, one Bradshaw was present in the courtroom as a representative of the Government of the District of Columbia. Bradshaw, like Avalone, was from the Office of the Inspector of Claims, Government of the District of Columbia. Bradshaw remained in the courtroom despite the fact that the rule excluding witnesses had been invoked. The trial court refused to permit Bradshaw to give testimony because he had remained in the courtroom in violation of the rule. From a judgment in favor of the plaintiff, the District of Columbia appealed and, as one of the points on appeal, charged that it was error for the lower court to refuse to permit Bradshaw to testify. This Court stated, *inter alia*:

“Not so important, since the evidence was perhaps cumulative, but equally erroneous, was the refusal of the court to permit the witness Bradshaw to testify, upon the ground that he had remained in the court room in violation of an order of court excluding the witnesses from the court room during the trial. It was stated at bar, and not controverted, that he was at the counsel table during the trial as the representative of the District. *It is always*

*improper to exclude a litigant, and we think the same rule should apply to the representative of a corporation. Heaton v. Dennis, 103 Tenn. 155, 52 S. W. 175; Lenoir Car Co. v. Smith, 100 Tenn. 127, 42 S. W. 879; Cottrell v. Cottrell, 81 Ind. 87. * * ** (Emphasis supplied).

In *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879, where an officer of a corporation was made subject to the rule on witnesses although it was requested that he be excepted from the operation of the rule, the court stated, "It is true that it was the corporation which was a party to the present litigation; * * * They can only be present by their representatives; and if it be that they are not, and adversary parties are, entitled to exemption from the rule, it is apparent the statute will operate with inequality, and often with great unfairness. We see no reason for adopting a construction which would work such partial results. We hold, therefore, that the officer of a corporation, charged with the duty of looking after its interests in a pending trial, falls within the spirit of the act in question. * * *" And in *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543, 555 Ann. Cas. 1913D-1262, the court said " * * * although the rule be granted, a party to the cause who intends to be a witness need not go under it * * * or an officer of a corporation whose presence is necessary for assistance to the attorney of the latter in presenting the case. * * *"

In the *Flagg* case counsel for the District of Columbia pointed out the practical disadvantage to which the District of Columbia would be put to if it were not permitted to have an official representative, familiar with the facts of the particular case, present in the courtroom during the trial. In the District's brief in the *Flagg* case (No. 2599, October Term, 1913), it was stated on page 18 that:

"First. The witness was representing the District of Columbia; had interviewed the witnesses

for the defendant, assisted counsel in preparing the case for trial, the witness being the only official of the District of Columbia with whom counsel could consult, who was conversant with the facts properly constituting a defense, and that as such official representative of the District of Columbia, he was a party in interest, had a right to be exempted from the rule, and should have been permitted to testify, either in chief or more especially in rebuttal."

The same argument is applicable in the instant case.

With the great number of civil cases which the District of Columbia must defend each year, it is absolutely essential that counsel for the District be fully advised as to the rights of the Government to have an official representative present during the trial of such cases. Having for 40 years relied upon the opinion in the *Flagg* case as being the law of this jurisdiction, it has been the practice of counsel for the District of Columbia to have an official representative of the District, conversant with the facts in the particular case, present during the trial. Obviously the District would be at a great disadvantage if it is now to be denied that right. Every attorney who has engaged in trial work to any extent, particularly in the trial of negligence cases, knows that many matters arise during a trial of which the attorney has no previous knowledge and about which one who previously investigated the facts can enlighten him.

Without mention of the *Flagg* case and without specifically resolving the issue, this Court has stated in the opinion of November 10, 1954, that it has "carefully considered the record and find(s) no error * * *". But an examination of the record in this case, coupled with the Court's aforementioned conclusion, will undoubtedly lead every trial judge in this jurisdiction to conclude, with unassailable logic, that the rationale of the *Flagg* case is no longer applicable and that it would *not* be error to exclude an official representative of the District of Columbia from the courtroom during

the trial if it appeared that such representative was to be a witness.

It was just as erroneous to exclude the District's official representative as it would have been to exclude the plaintiff from the courtroom during the trial of her case. That the District was represented by Assistant Corporation Counsel does not change the situation. They were present as lawyers for the defendant and not as its corporate representatives or agents.

The denial of the right of a litigant to be present in court at the trial of his case is a denial of due process of law and contravenes the Constitution. It is submitted that the District of Columbia should not be deprived of such a fundamental right. The *Flagg* case clearly established that right in the District and that right has existed for at least 40 years. The effect of the opinion of November 10, 1954, if it should be allowed to stand, is that the *Flagg* case has been overruled without any reference being made to it.

II

There was no notice, actual or constructive, of the alleged dangerous condition and the lower court erred in not so ruling as a matter of law.

Besides denial of due process of law by its exclusion from the courtroom during a trial of its case, the District of Columbia was aggrieved by two other errors which it raised as points on appeal. The first of these is the total absence from the record of any evidence establishing that the District had notice, either actual or constructive, of the alleged dangerous defect, notwithstanding the positive rule laid down by the Supreme Court in *District of Columbia v. Woodbury*, 136 U. S. 450, and followed many times by this Court, that proof of notice is an essential element of the plaintiff's case.

The other point is that the record is equally devoid of evidence to support the only allegation of negligence contained in appellee's amended complaint, namely that the District failed to remove from a tree space a "metal base which *it had placed therein* and failed to remove after actual or constructive notice thereof * * *." (Emphasis supplied.)

Briefly, the factual situation on these two points is as follows:

Since there was no proof that its existence was reported to it, the District could have had no actual notice of the "metal base" or stanchion unless the District itself had installed the stanchion, cut it off, and either allowed it to remain partly exposed or permitted it to become exposed later. The only proof relating to this element of the case was (1) the testimony of *appellee's witness* Parlon, the foreman in charge of signs for the District of Columbia, that *the records of the District failed to show that the District had ever placed a sign at the specific location* of appellee's alleged fall; (2) testimony proving the existence of the cut-off stanchion at the time of appellee's alleged fall; and (3) testimony that the cut-off stanchion *looked like* the same type of pole that the District used (App. 39-41).

To permit a jury to speculate upon such evidence is unquestionably error. The per curiam opinion filed herein not only completely overlooks the positive law of the *Woodbury* case, *supra*, but it puts the Court's stamp of approval upon a fallacious doctrine—that an inference may be drawn from an inference. The essential element of notice could only be established from the evidence in the record by drawing these inferences one upon the other:

- (1) The appellant installed a stanchion at the spot where appellee fell;
- (2) The appellant later cut off the same stanchion near the ground;

(3) Either:

- (a) When the stanchion was cut off it was allowed to remain protruding above the ground in the tree space, or
- (b) Sometime after cutting off the stanchion and driving the small remaining portion into the ground, erosion occurred so that the portion so driven into the ground protruded at some later date not disclosed.

There appears to be a growing tendency to leave all decisions to juries as though such bodies are omniscient. The Federal Rules of Civil Procedure have given to plaintiffs access to all facts in the possession of the defense. Every advantage now lies with the plaintiff. It would seem that in such circumstances there should not be a relaxation but a re-affirmation of fundamentals of proof. In unequivocal terms this Court should repeat the age-old rule that the plaintiff should prove every element of his case before the defense is required to go forward, and trial judges should be encouraged to take from the speculation of juries cases in which an essential element is lacking or is sought to be proved by inferences drawn on inferences.

CONCLUSION

In substance, appellee proved only that she was injured by stumbling over a cut-off stanchion in a tree space, which stanchion *looked like* the type used by appellant. Notwithstanding that upon this proof a jury returned a verdict in favor of appellee, the proof is insufficient to substantiate a judgment where notice to the appellant of the existence of the stanchion is not proved by any evidence, where this essential element of appellee's case depends upon the drawing of inference upon inference, and where appellant was denied due process of law by having its representative excluded from the courtroom. To correct such obvious errors, the

appellant submits that this case should be set down for a rehearing before all the members of this Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is filed in good faith and not for any purpose of delay.

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